Summer 2002

Towards a National Putative Father Registry Database

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TOWARD A NATIONAL PUTATIVE FATHER REGISTRY DATABASE

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In the United States, every third child is born to an unwed mother.[1] These children are relinquished for adoption at a greater rate than those born to married mothers.[2] Adoption of a child born to an unwed mother creates a quandary of how best to protect the parental rights of the father and the privacy rights of the mother while simultaneously securing the best interests of the child. Baby Jessica, Baby Richard, and Baby Emily were highly publicized court cases in the early 1990s where unmarried birth fathers contested the adoptions of newborns. The public felt strongly about state courts disrupting the adoptions of these children vis-à-vis the late assertion of their birth father's rights, but the United States Supreme Court declined to review the States' decisions in these cases.[3] In the wake of Baby Jessica, state legislatures, in an attempt to avert such disrupted adoptions, enacted putative father registries designed to mandate notice of adoptions to unwed fathers who file notice of intent to claim paternity with registries in the prescribed time. A State's putative father registry protects the rights of an unwed father and an adoptee within its State.

Recently, in the context of adoptions where interstate travel was used to thwart their efforts to assert paternity, two unwed fathers successfully sued in tort for intentional interference

1. Wade F. Horn, *Wade Horn on 1998 Child Indicators* (July 25, 2000), http://lists.his.com/smartmarriages/msg00260.html. "In 1998, fully 33 percent of all children were born to unwed mothers—an all time high. Among women under age 25, nearly two-thirds of all first births were out-of-wedlock. For births to eighteen- to nineteen-year-olds, 74 percent were out-of-wedlock." *Id.*

2. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK: UNITED STATES DATA, ISSUES, REGULATIONS & RESOURCES 4 (1989). Planned Parenthood estimates that half of all pregnancies are unintended. *AMA Enters Debate on 'Morning-After' Pill*, COLUMBUS DAILY TRIB., Dec. 2, 2000, http://archive.shownews.com/2000/dec/20001202news008.asp.

3. Scott. A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 379-80 (1996). The Supreme Court has refused to review unwed fathers' rights in the newborn adoption cases. It has, however, provided guidance on unwed fathers' rights to older children. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979). In these cases, the Court held that a biological connection plus establishing a relationship with a child preserved an unwed father's rights to his child.

with their parental rights.[4] These costly torts have re-focused attention on the rights of unwed fathers in adoptions. Individual state putative father registries cannot protect the parties in such adoptions, because registration in the State of conception will not ensure notice of an adoption proceeding in another State.

This Article analyzes putative father registries and proposes federal legislation to create a national database that will enhance and connect the state and local registries. Issues and events leading to the development of registries are reviewed in Part I. Putative father registry mechanics and applicable case law are analyzed in Parts II and III. The case law examined includes unwed fathers' rights, in-state paternity registry contests, requests for impossibility exceptions exempting registry requirements, and tortious interference with parental rights. Part IV argues for a national putative father registry database and investigates avenues of federal participation and recommendations for specific legislation.

I. BACKGROUND

In 1972, the Supreme Court first upheld and defined the constitutional rights of men who fathered children out of wedlock.[5] In *Stanley v. Illinois,* the Court held that equal protection requires state law to treat the unmarried mothers and fathers of children similarly.[6] This heralded a societal shift away from deferring to the wishes of unmarried mothers.

Upholding the constitutional rights of unmarried fathers to their children does not assure that these men will assume parental responsibilities, however. Protecting paternal rights of unmarried fathers without requiring corresponding responsibilities fails to ensure permanent and stable parents for children because unmarried fathers who have no legally defined role in their children's lives have no legal requirement for custody or support. Consonant with enhancing parental responsibility of undefined and non-custodial parents, between

4. *See* Kessel v. Leavitt, 511 S.E.2d 720 (W. Va. 1998); Kessel v. Leavitt, 75 Cal. Rptr. 2d 639 (Cal. Ct. App. 1998) (ordered not published); Smith v. Malouf, 722 So.2d 490 (Miss. 1998), *implied overruling recognized by* Adams v. U.S. Homecrafters, Inc., 744 So.2d 736, 742 (Miss. 1999).

5. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

6. *Id.*

1984 and 1996 Congress passed legislation and established child support guidelines designed to increase the adequacy of child support sums[7] as well as enforcement of its payment.[8] The impact of child support legislation on adoption is not documented, but, unmarried fathers certainly factor into their adoption decision the nearly inescapable requirement to pay child support for at least eighteen years if the child is not adopted.

Adoption has evolved over time in response to these legal developments and to social trends as well. In the 1970s, the number of American adoptions decreased in association with the legalization of abortion and society's increasing acceptance of single motherhood.[9] While reports on adoption rates conflict, that downward trend apparently continued for the adoption of infants at least through 1995.[10] In contrast, the total number of all children adopted in 1992 was a substantial 127,441, which represented a seven percent increase over the prior year.[11]

The number of adoptions is also affected by foster care

7. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-2378, 98 Stat. 1305 (codified as amended in scattered sections of 26 U.S.C. & 42 U.S.C.); Margaret Campbell Haynes, *A Review of* Child Support Guidelines: Interpretation and Application , 31 FAM L.Q. 133, 136 (1997) (book review) (reviewing LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (1996)) (noting that the Child Support Enforcement Amendments were designed to achieve greater adequacy and consistency of awards and required states to develop guidelines by 1987).

8. *See* Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of various titles). With this statute, Congress "radically transform[ed] child support enforcement" and moved the states "toward centralization, automation, and administrative procedures." Haynes, *supra* note 7, at 133.

9. Mary M. Beck, *Adoption of Children in Missouri*, 63 MO. L. REV. 423, 428 (1998).

10. *See* Evan B. Donaldson Adoption Inst., *Private Adoption Facts, at* http://www.adoptioninstitute.org/FactOverview/domestic.html (last visited Apr. 25, 2002). "A variety of factors, including increased access to contraception, the legalization of abortion and changed social attitudes about unmarried parenting, have caused the number of white infants placed for adoption in the U.S. to decline dramatically." *Id.* "Between 1989 and 1995, 1.7 percent of children born to never-married white women were placed for adoption, compared to 19.3 percent before 1973. Among never-married black women, relinquishment rates have ranged from .2 percent to 1.5 percent." *Id.*

11. Beck, *supra* note 9, at 423 n.4. Estimates on numbers of adoptions completed annually are inexact, because the U.S. Bureau of the Census, other federal agencies, and most states do not systematically track the total number of adoptions. Authorities put the number somewhere between 140,000 and 160,000 annually. Joan Heifetz Hollinger, *Introduction to Adoption Law and Practice, in* 1 ADOPTION LAW AND PRACTICE §§ 1.05[2][a], [b] (Joan H. Hollinger ed., 1998).

policies, which in turn are affected by laws regarding the termination of parental rights. The number of adoptions of children from foster care decreased up to 1990, before federal and state initiatives caused the number to increase dramatically.[12] Child protective services emphasize a public policy of family preservation that prioritizes returning foster children to the home of their biological parents.[13] But, "[a]bout one third of the children that return to their homes from foster care re-enter the foster care system within six months."[14] This cycle of entering foster care, returning home, and re-entering foster care blocks children's availability for adoption and consumes time during which the chances for children to find permanent adoptive families diminish.[15] One of the factors responsible for foster care drift is the difficulty in terminating parental rights, including those of the unwed father.[16] Thus, the birth father problems that burden the stable placement of children for adoption exist for foster children as well as newborns.

Adoption is an important issue to the United States not merely because it affects many families. Every child adopted is less likely to grow up in poverty, more likely to obtain an education, and more likely to have a participating father than a child raised by a single mother.[17] Thus, the personal effects of adoption upon the individual child and its economic effects upon the nation are significantly positive.

Suitably, the federal government has implemented a pro adoption policy. In 1994, Congress authorized federal tax

12. "Foster care adoptions increased 78 percent from 1996 to 2000, as a result of [federal] and state initiatives" Evan B. Donaldson Adoption Inst., *Foster Care Facts, at* http://www.adoptioninstitute.org/FactOverview/foster.html (last visited May 12, 2002) (citing Adoption and Safe Families Act of 1997, Pub. L. No. 107-136, 111 Stat. 2115 (codified at scattered sections of 42 U.S.C)).

13. Julie A. Luetschwager, *Adoption: Comparison of State Statutes, Analysis of Barriers, and the Role of Nursing*, 7 J. NURSING L. 31, 33 (2000).

14. *Id.* at 33-34.

15. *Id.* at 34. The effects of age on adoption are as great as the effects of race on adoption. *Id.* at 36.

16. *Id.*

17. *See* Beck, *supra* note 9, at 423. "Children who grow up absent their fathers are five times more likely to be poor, two to three times more likely to fail at school and two to three times more likely to suffer from an emotional or behavioral problem. As teenagers, fatherless children are more likely to commit crime, engage in early and promiscuous sexual activity and to commit suicide;" *Id. See also* Wade F. Horn, *Dads Face Sad Statistics*, COLUMBUS DAILY TRIB., June 18, 2000, http://archive.showmenews.com/2000/jun20000618comm008. asp.

credits to adoptive parents for qualified adoption expenses and provided financial incentives to States for each foster child or special needs child adopted over a base number.[18] In 2001, Congress and President Bush re-authorized and increased the adoption tax credit.[19] While he was in office, President Clinton directed an Executive Memorandum to the Department of Health and Human Services effectively recommending strategies to double the number of American adoptions.[20] Facilitating and supporting adoptions has bipartisan support.

Despite pro-adoption federal policy and case law protecting the parental rights of birth parents, contested adoptions continue to arise. Wrenching publicity caught the nation's attention when the thwarted father of Baby Jessica, who was born to an unwed mother, disrupted the adoption of a then two-year-old Jessica.[21] Babies Richard and Emily followed Jessica, and in their wake States began following New York's lead by enacting putative father registries for unwed fathers in an effort to decrease contested adoptions.[22] The Uniform Adoption Act requires notice either personally or through publication,[23] while the Uniform Parentage Act and over thirty

18. I.R.C. §§ 23, 137 (2001). Adoptive parents are provided with tax credits of up to $10,000. I.R.C. § 23.

19. Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of Title 26).

20. *See* Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 2 PUB. PAPERS 2209 (1996). *See also* Dep't of Health & Human Serv., Adoption 2002: A Response to the Presidential Executive Memorandum on Adoption (Dec. 14, 1996), http://www.acf.dhhs.gov/programs/cb/initiatives/adopt2002/2002toc.htm. In 1997, over 500,000 children lived in foster care, but no more than 27,000 were adopted. ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT AND THE ADOPTION ALTERNATIVE 25 (1999). The states' family preservation services probably impede adoption of foster children. *Id.* at 25-26. But, adoptions out of foster care did nearly double between 1996 and 2000. *See* Evan B. Donaldson Adoption Inst., *Foster Care Facts, at* http://www.adoptioninstitute.org/FactOverview/foster.html (last visited May 12, 2002) (noting a seventy-eight percent increase in adoptions from foster care between 1996 and 2000).

21. *In re* Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992); *In re* Baby Girl Clausen, 501 N.W.2d 193 (Mich. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993), *aff'd sub nom*,. DeBoer *ex rel.* Darrow v. DeBoer, 509 U.S. 1301 (1993). Jessica's mother had reported the wrong father at the time of the relinquishment and her biological father had never consented to the adoption. *See In re* Baby Girl Clausen, 501 N.W.2d at 194. Upon discovering her existence, he filed a paternity action. *Id.*

22. *See In re* Interest in B.G.C., 496 N.W.2d at 239; *In re* Petition of Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993). The Supreme Court approved of New York's putative father registry scheme in Lehr v. Robertson, 463 U.S. 248 (1983).

23. UNIF. ADOPTION ACT § 3-404, 9 U.L.A. 11 (1994) (requires courts to determine if a potentially uninformed father can be identified

States currently have putative father registries.[24]

The phenomenon of contested adoption leads to litigation and demonstrates the inadequacy of existing legal regimes to secure adoption placements. A 1998 tort award of large damages for the intentional interference with parental rights further expanded the rights of unmarried fathers in newborn adoptions.[25] This case involved an unwed West Virginia father whose efforts to establish paternity and to prevent the child's adoption were thwarted by the mother who moved between States during her pregnancy. She delivered the baby in California and ultimately relinquished her child to a Canadian couple. This case involved a novel application of tort law to a thwarted father adoption and opens the gates to more such litigation.[26] It also demonstrates the inadequacy of individual state laws to protect the rights of unmarried biological fathers, adoptive parents, and children in a globalized world in which interstate and even international travel is commonplace.

Children, their biological parents, and their adoptive parents experience extreme anguish in a disrupted adoption. Intentional interference with parental rights torts can exact huge economic and psychological tolls on all the parties and their attorneys. Adopted children, birth mothers, unmarried birth fathers, adoptive parents, and their respective attorneys require a solution upon which they can comfortably rely. Individual state putative father registries can alleviate problems where the adoption is filed in the State of conception as long as the statutory scheme contains a time deadline within which the father must file. But individual registries cannot cure contests arising where the adoption is filed in a State unknown to the father. Imagine this hypothetical: college students in Missouri conceive a child, and the birth mother travels to deliver and relinquish the baby not in her home State of Illinois, but in her grandmother's home town in Nebraska. In this scenario, the birth father has not been notified of his duty

24. UNIF. PARENTAGE ACT art. IV, 10 U.L.A. 321 (2000) (requiring registries to be established). *See infra* Chart of State Statutes Describing Paternity Registries.

25. *See* Kessel v. Leavitt, 511 S.E.2d 720 (W. Va. 1998). The court did not assess damages against the mother but did assess crushing money damages against her relatives and attorney. *Id.* at 813-14. The court awarded punitive damages totaling $5,850,000 to five defendants but awarded no damages against the mother. *Id.* at 814.

26. *See id.* at 754.

to file with the Nebraska registry to protect his parental rights irrespective of whether the mother concealed or disclosed the pregnancy.

Congress should enact a national putative father registry database to address the interstate effect of adoptions. This system would have the dual purposes of facilitating notice of adoptive proceedings to unmarried birth fathers in interstate adoptive situations and of promoting secure adoptive placements. The state putative father registries should file with the national putative father registry database for every man who files with the State. Each State should maintain its own statutory adoption scheme including regulation of the parental rights and responsibilities of unwed fathers. The national link should provide a means for the registered unwed father to obtain notice of the need to protect his parental rights in any of the participating States despite the interstate travel of the mother. The federal government should offer funds to the States for the erection and maintenance of compatible registries.

States can implement a variety of steps to facilitate the adoption process and ensure protection of fathers' rights. All States should enact putative father registries that permit pre-birth registration and guarantee notice to a father who files within a state-set time limit, beyond which notice is not guaranteed. The registries should exist in a format compatible with a national database. States should structure individual state filing such that it is immediately (both by electronic means and by hard copy) transmitted to the national registry. State laws should provide for publicizing the existence and purpose of the registries and notify fathers that filing with the registry may be used as probative (though not conclusive) evidence in a paternity child support action. State laws should require attorneys, state agencies, and/or adoption agencies in a planned or pending adoption to search the nationally linked putative father registry before final disposition of the adoption proceedings.

Furthermore, States should amend their long arm statutes to assert personal jurisdiction over the putative father who was served or not served notice in compliance with state law consonant with the search results of the national database—where the State of adoption has proper jurisdiction over a filed

adoption. States should immunize attorneys, agencies, and parties from suit for tortious interference with parental rights where they have complied with the State's adoption procedure on putative fathers, including searching the national database. States should place a surcharge on the filing of adoption petitions to fund their state registries and should charge a putative father registry filing fee in order to cover the cost of filing with the national registry. States should develop a procedure for men to register in forma pauperis where appropriate.

To protect the privacy of women, Congress and the States should regulate who may search the registries and criminalize fraudulent registry filings and searches.

While a national putative father registry link may protect the rights of birth fathers, it does not assure that these children will have responsible fathers. State laws should also compel unmarried fathers to legally establish paternity and assume parental responsibilities during the period of pregnancy of the mother and within a short and finite period of time after the birth where they wish to thwart adoptions. The end result advances the best interests of children either by insuring the active participation of birth fathers or securing prompt and permanent adoptive placements.

II. PUTATIVE FATHER REGISTRY MECHANICS

A. Registration and Notice

The mechanics of paternity registries require a man who believes he may have fathered a child out of wedlock to file a notice with the appropriate state agency. Putative father registries typically operate by providing any registrant with notice of any adoption petition for a child of the woman named in his filing.[27] Notice provides the man with knowledge of any adoption plan, and thus gives him the opportunity to consent to the adoption, default on the adoption petition, or argue at the initial hearing that he should parent the child instead of the

27. Rebeca Aizpuru, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 705 (1999). *But see* VT. STAT. ANN. tit. 15A, §§ 1-110, 3-401 (1995); (establishing a central registry for parents filing an intent to retain parental rights with the probate courts, but not providing notice of an adoption).

prospective adoptive parents. Such a hearing is intended to ensure the best interests of the child either by establishing the biological father's intent and capacity to parent or by securing the adoptive placement. The putative father registries may exist alone in a State to guarantee notice,[28] but more commonly they co-exist with a statute that provides consequences for failure to file by the deadline. These consequences delimit the father's rights either by cutting off his right to notice,[29] voiding his right to consent to an adoption,[30] and/or establishing grounds for termination of his parental rights.[31]

Paternity registry deadlines commonly operate to cut off the notice guarantee for those men registering after the State's deadline. States have taken different approaches to deadlines—some setting a finite deadline measured from the child's birth, some setting a deadline up to the time a petition for adoption is filed, and some setting a hybrid deadline.[32] These deadlines range from five to thirty days after birth.[33] Typically, statutes permit registration prior to birth, making the effective period of registration nine months plus the State's deadline period.[34]

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28. *See, e.g.*, ARK. CODE ANN. § 20-18-702 (Michie 1987).

29. *See, e.g.*, IOWA CODE ANN. §§ 144.12A, 600A.6(1) (West 2001).

30. *See, e.g.*, IND. CODE § 31-19-5-18; MO. REV. STAT. § 453.030(3)(2)(b).

31. *See, e.g.*, 750 ILL. COMP. STAT. 50/12.2(h) (2001). *But see In re* Tinya W., 765 N.E.2d 1214, 1217 (Ill. App. Ct. 2002) (holding that failure to register with the state's putative father registry may be considered in a fitness determination in a dependency case).

32. Aizpuru, *supra* note 27, at 716. Utah law provides for a hybrid deadline and requires that the putative father file before placement of a child for adoption. Where a child was placed three days after birth and father missed the registration deadline by one day, Utah held that a firm cutoff date was reasonable and father's registering "close" to the deadline was of no constitutional importance. Sanchez v. L.D.S. Soc. Servs., 680 P.2d 753, 755 (Utah 1984). This case demonstrates the issues involved in statutory roving deadlines tied to such untimed events as when the mother places the child for adoption or when the adoption petition is filed.

33. *See* NEB. REV. STAT. § 43-104.02 (1998) (five days after birth); N.M. STAT. ANN. § 32A-5-19(E) (Michie 1978) (ten days after birth); MO. REV. STAT. § 453.030(3)(2)(b) (2001) (fifteen days after birth); Aizpuru, *supra* note 27, at 716.

34. ALA. CODE § 26-10C-1(I) (2000); ARIZ. REV. STAT. § 8-106.01(B) (1996); ARK. CODE ANN. § 20-18-702 (1999); IDAHO CODE § 16-1513 (Michie1999); 750 ILL. COMP. STAT. 50/12.1(B) (2001); IND. CODE § 31-19-5-12 (2000); IOWA CODE § 144.12A (2001); LA. REV. STAT. ANN. § 9:400(2) (2000); MASS. GEN. LAWS CH. 210, § 4A (2001); MICH. COMP. LAWS § 710.33 (2001); MINN. STAT. § 259.52 (2001); MO. REV. STAT. § 453.030(3)(2)(B) (2001); MONT. CODE ANN. § 42-2-206 (1999); N.H. REV. STAT. ANN. § 170-B:5-A(C) (1999); TENN. CODE ANN. § 36-2-318(E)(3) (1997); TEX. FAM. CODE ANN. § 160.256(C) (2001); WIS. STAT. § 48.025(2) (2000). Many other statutes require registration before their state deadline but do not specifically indicate whether men may register prior to birth even though that interpretation is left open. *See infra* Chart of State Statutes Describing Paternity

States tend to strictly construe registry deadlines against fathers.[35]

Where a State's registry has a deadline and a man fails to register by that deadline, he may or may not be entitled to notice of an adoption depending upon state law and constitutional due process guarantees. The Supreme Court has held on three occasions that an unmarried father is constitutionally entitled to notice of adoption proceedings of a child with whom he has established a relationship.[36] Additionally, state law often entitles men to notice if they have filed a timely notice of intent to claim paternity with the putative father registry, have been adjudicated to be the father, are the "presumed fathers," or are required to give consent.[37] State statutes may define a presumed father as one who has married or attempted to marry the mother within certain time frames, has acknowledged his paternity in writing and filed with the state bureau of vital statistics, has consented to have his name on the birth certificate, or has tissue or blood testing confirming his biological paternity.[38]

Thus constitutional guarantees and state law requirements limit the deadlines that can be imposed by putative father registries in order to protect those fathers who have assumed certain responsibilities or established relationships with their

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Registries.

35. Utah held that a putative father's registration postmarked on the day of the child's birth but received in the appropriate office after placement of the child for adoption seven days later did not constitute timely notice preventing termination of his rights. Wells v. Children's Aid Society of Utah, 681 P.2d 199, 200-201, 207 (Utah 1984). Alabama attempted to refuse to exempt a putative father from the putative father registry requirement where he filed a legitimation action but did not timely file with the registry, but this decision was later reversed. S.C.W. v. C.B., 2001 WL 29297 (Ala. Civ. App. 2001), *rev'd sub nom., Ex parte* S.C.W., 2001 WL 1218940 (Ala.).

36. *See infra* Part III.A. *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989). In *Michael H.*, the Court held constitutional a California statute implementing:

> a substantive rule of law declaring it to be generally irrelevant for paternity purposes whether a child conceived, during and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him, based on the state legislature's determination as a matter of overriding social policy that the husband should be held responsible for the child and that the integrity and privacy of the family unit should not be impugned.

Id. at 111. The court, in a plurality opinion, held that the unwed father had no protected liberty interest in the parental relationship. *Id.*

37. *See, e.g.*, MO. REV. STAT. § 453.060 (2000) (describing notice); *Id.* § 453.040 (describing whose consent is necessary); *Id.* § 210.822 (defining presumed fathers).

38. *See, e.g., id.* § 210.882.

children. Nonetheless, the full putative father registry paradigm places increasing responsibility on the man to protect his own paternal rights. The intention of this system is to enable the father to effectively assert paternity and assume related duties, or to timely foreclose his rights so that the child may safely develop ties to adoptive parents without risk of disruption.

B. Jurisdiction over Interstate Adoptions and Non-Resident Fathers

The issue of notice as provided by putative father registries intersects with an analysis of state-court jurisdiction over interstate adoption and non-resident fathers. State courts routinely terminate the parental rights of absent fathers, some of whom are non-resident fathers, because they default on adoption petitions after published service. Searching the national putative father registry database not only promises to facilitate personal service to registered fathers, its existence may statutorily eliminate the need for published or personal service in those cases where the father has not registered and no constitutional guarantee requires notice. Many jurisdictional issues are raised, however, about judicial proceedings affecting the parental rights of absent and non-resident fathers.

Several issues bear on the jurisdictional analysis: 1) whether States must obtain personal jurisdiction over non-resident birth parents in adoption cases or whether notice and an opportunity to be heard suffices; 2) whether a State has subject matter jurisdiction over the adoption of the child and the relevance of the Uniform Child Custody Jurisdiction Act (UCCJA)[39] in competing state court determinations of paternal rights; 3) whether compliance with a putative father registry notice scheme abrogates whatever need for personal jurisdiction exists and/or satisfies constitutional requirements; and 4) the relevance and applicability of long arm statutes on such jurisdiction.[40]

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39. 9 U.L.A. pt. 1, at 115 (1988).

40. The Parental Kidnapping Prevention Act (PKPA) guarantees national full faith and credit to state court custody decisions. 28 U.S.C. § 1738A(a) (1994). It does not figure into this jurisdictional analysis, however, because the PKPA guarantees full faith and credit only to judgments where courts had legitimate jurisdiction. 28 U.S.C. § 1738A(c) (1994).

1. Is Personal Jurisdiction over the Father Required?

In 1953, the United State Supreme Court in *May v. Anderson*[41] held that a state court must have in personam jurisdiction over a parent to make an order that validly affects his/her rights to child custody. In *May*, a Wisconsin court did not have in personam jurisdiction in a dissolution necessary to validate child custody order with personal service on the mother living in Ohio with her children.[42] This holding suggests that service of notice by publication would not establish in personam jurisdiction over a non-resident parent for matters affecting child custody—a question that the court has not addressed in subsequent cases[43] and had previously expressly refused to address in *New York* ex rel. *Halvey v. Halvey*.[44]

In 1972, the Supreme Court recognized in *Stanley v. Illinois*[45] an unwed father's right to notice and an opportunity to be heard.[46] The Court has subsequently narrowed that right to fathers who have come forward, identified themselves, and developed a relationship with, and assumed some responsibility for, the child.[47] The Court, which decided *Stanley* nineteen years after handing down *May*, cited *May* in its *Stanley* opinion, but did not otherwise suggest that personal jurisdiction, as distinguished from notice and the right to be heard, was constitutionally required to resolve a biological father's rights in an adoption.[48] Personal jurisdiction was not at issue in *Stanley*, which was a wholly intrastate Illinois dependency case.

The common practice of publishing notice of an adoption to a non-resident father may not establish personal jurisdiction under *May*. A State's long arm statute may be adequate for the State to obtain jurisdiction over non-resident fathers who have

41. 345 U.S. 528 (1953).

42. *Id.* The father had filed the dissolution in Wisconsin, where he lived and where the family had previously lived together. *Id.* at 530.

43. *See* Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 735-36 (1996).

44. 330 U.S. 610, 615-16 (1947) (expressly reserving judgment on whether a Florida decree of custody has any binding effect on an out of state husband in the absence of personal jurisdiction).

45. 405 U.S. 645 (1972)

46. *Id.* at 657-58.

47. *See* Kay, *supra* note 43, at 739-40.

48. *Stanley*, 405 U.S. at 651.

conceived a child within the State, however.[49]

Child custody orders differ substantially from adoption orders because custody orders are modifiable, apportion visitation and custody, and do not sever the relationship between parent and child. In contrast, adoption orders are final, non-modifiable, and ultimately terminate all biological parental rights, effecting a permanent severance between parent and child. While scholars agree that personal jurisdiction is required over a parent in matters of child custody,[50] the same scholars observe that the opinion in *Stanley* is unclear with respect to whether only notice and an opportunity to be heard is required to terminate the parental rights of a birth parent.[51] The proffered rationale is that requiring personal jurisdiction would destroy adoption practice.[52] Whether this rationale will satisfy due process may depend upon whether providing only notice and an opportunity to be heard is adequately related to advancing the State's legitimate interest in securing permanent placements for children in adoption and whether a State could obtain personal jurisdiction without jeopardizing the State's interests in adoptive placements.[53]

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49. *See, e.g.*, MO. REV. STAT. § 506.500 (2000).

50. Scholars have extensively debated whose opinion in *May* correctly describes the need for personal jurisdiction in child custody matters: Justice Burton's plurality opinion, Justice Frankfurter's concurrence, or Justice Jackson's dissent. *See, e.g.*, Kay, *supra* note 43, at 735-36.

51. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 856-57 (2d ed. 1988) (criticizing the *Stanley* court for confusing the role of personal jurisdiction. The Court had favorably cited *May v. Anderson*, "which had held that custody decrees must be based upon personal jurisdiction over the defendant," and then proceeding to state "that custody of an illegitimate child may be based upon service by publication, apparently failing to notice that this statement was quite inconsistent with *May v. Anderson*." *Id.*).

52. *See* Kay, *supra* note 43, at 739-40.

53. *See* E.A. v. State (State *ex. rel.* W.A.), No. 20000461-CA, 2002 Utah App. LEXIS 17 (Utah Ct. App. Mar. 7, 2002). Utah recently held that it lacked personal jurisdiction to terminate the parental rights of a man incarcerated in Oklahoma for a dependent child in Utah because its long arm statute did not enumerate conduct alleged in the termination petition against the father. *Id.* at **11. The court made a determination that the father had sufficient contacts with the forum State to make personal jurisdiction constitutional, *id.* at **7-**10, and nearly invited its legislature to amend the long arm statute to include such conduct. *Id.* at **11, **28. The court declined to apply the status exception to personal jurisdiction, which is available in some states to terminate parental rights, because parental rights are fundamental liberty interests. *Id.* at **16-**17. The court did not consider the UCCJA, which would dispense with personal jurisdiction, require that termination of parental rights be in the "home state," and provide notice to the father and opportunity to be heard. The dissenting judge argued that the status

2. Subject Matter Jurisdiction and the Relevance of the UCCJA

Whereas competing courts analyze who has jurisdiction over a father's rights, the UCCJA has come into play in determining subject matter jurisdiction, or jurisdiction over the child.[54] For example, during an Oregon adoption case, a putative father filed a paternity action in his home State of California but the Oregon court terminated the father's rights under its own putative father registry statute. Upon analysis, the Oregon court found that the child was born in Oregon, that his birth mother consented to his adoption in Oregon, and that the child had been living with his adoptive parents in Oregon. The court used those facts to assume jurisdiction over the child under the UCCJA.[55] In contrast, the *May* court held that the domicile of the children living in Ohio was unimportant to its analysis, because their domicile did not give either Wisconsin or Ohio personal jurisdiction to make orders affecting the parent living in the other State.[56] The drafters of the UCCJA and UAA decided that personal jurisdiction over the absent parent was unnecessary,[57] but the Uniform Paternity Act (UPA) requires personal jurisdiction.[58] Subject matter jurisdiction in termination of parental rights and paternity cases is now expressly controlled by the UCCJA for child custody and expressly not controlled in adoption.[59] That the UCCJA purports to determine subject matter jurisdiction over the child does not confer authority on the court to order termination of parental rights if doing so in the absence of personal jurisdiction over the parent is unconstitutional. Though, upon challenge, a court could determine that such jurisdiction over

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exception to personal jurisdiction should apply to sever a parent-child relationship as it does to sever spousal relationships. *Id.* at **32-**41 (Billings, J., dissenting). Importantly, the dissent asserted that if Utah could not obtain jurisdiction to conduct the termination proceeding in the case, then no State could because the father's State is unlikely to assert jurisdiction where the child is not present there, has not resided there for seven years, and was not abandoned there. *Id.* at **41-**42.

54. *See id.* at 729-31.

55. Hylland v. Doe, 867 P.2d 551 (Or. Ct. App. 1994).

56. May v. Anderson, 345 U.S. 528, 533-34 (1953).

57. *See* Kay, *supra* note 43, at 736 (explaining that the drafters assumed the controlling opinion in *May* was Frankfurter's concurrence, which held that personal jurisdiction is not required).

58. UNIF. PARENTAGE ACT § 405 (amended 2000), 9B U.L.A. 324 (2001).

59. Such policy controverts those commentators who argued that the original UCCJA was intended for modifiable post dissolution custody orders and not final adoption orders.

the child trumps personal jurisdiction over a parent in order to advance the child's best interests.

3. *The Effect of a National Putative Father Registry on the Jurisdictional Analysis*

Utilizing a national putative father registry database would obviate such interstate conflict because when a father registers in his State, that State would automatically transmit the registration to the national database. For example, the Oregon court in *Hylland* would have searched the national registry, found the California father, and served him with notice of the petition. Once served, however, Oregon's jurisdiction over the father would be suspect under *May* if the father defaults or makes a limited appearance to argue the court's lack of personal jurisdiction.

Utilizing a nationalized registry leads to mixed results for the absent father. The absent father who has not transformed his inchoate right into a constitutionally protected right by registering or assuming parental responsibilities does not even have the right to notice or an opportunity to be heard.[60] Searching the father's state registry and providing notice as per its law satisfies the father's notice requirement, but if the search is done by a second State, that State may not be able to establish personal jurisdiction over him. Thus, while the adoption State may have satisfied its own and/or the father's state requirement for notice, the adoption State may or may not have obtained personal jurisdiction over him and may or may not even need personal jurisdiction over him to terminate his rights.

4. *National Registry Must Be Accompanied by Amendment of State Long-Arm Statutes*

The putative father registry database would not resolve these jurisdictional issues. A determination of the need for notice will not resolve whether a court needs personal jurisdiction over a non-resident father who fails to file with the registry in the State of the adoption if conception occurred in another State. Resolution of this problem requires each State to amend its

60. *See generally* Stanley v. Illinois, 405 U.S. 645 (1972).

long arm statutes so that it may assert jurisdiction over a non-resident father when the State searches the national registry database and provide him with notice and an opportunity to be heard that satisfies its own and/or his State's statutory notice requirement. This paradigm assumes that the adoption State has subject matter jurisdiction over the father's child and essentially incorporates a reciprocal arrangement between the father's State and the State of the adoption. If the registered father responds to notice and proves that he has filed a paternity action in his State prior to the filing of the adoption petition, then the two judges should confer and resolve jurisdiction under the UCCJA.

C. Existing Model Registry Legislation

The putative father registry statutes and surrounding case law reveal that an increasing number of States are enacting such statutes and refining the mechanics that allow an unwed father to protect his rights. The overarching goal is to establish procedures that advance the best interests of the child by quickly providing her a stable and permanent home and by avoiding disruption of an adoptive placement because a father untimely asserts his paternity.[61] The putative father registries provide the birth father with the opportunity to protect his parental rights without having to rely upon either the adoptive parents or the birth mother for information about the child. Registries provide a more effective system of notifying the father of adoption than publishing notice in a newspaper, and place responsibility upon the father to promptly assume parental responsibility.[62] Additionally, the putative father registry protects the privacy and safety of the birth mother, for three reasons. First, she is not compelled to name the man or men with whom she has had sexual intercourse. Second, no newspaper will publish notice to a birth father listing her name.

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61. Courts have uniformly held that the timeliness of a father's efforts to assert paternity are the "'most significant' element in determining whether an unwed father has created a liberty interest" in his child, because of the state's legitimate interest in the child's need for early permanence and stability. Robert O. v. Russell K., 604 N.E.2d 99, 103 (N.Y. 1992). "To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant. Promptness is measured in terms of the baby's life not by the onset of the father's awareness." *Id.*

62. Steve Kirsch, Adoption Briefs (Fall 1995) (on file with author).

Finally, she is not compelled to name a father who is abusive toward her and threatens her and/or the child's safety. Additionally, adoptive parents can rely upon putative father registries to increase the security of their adoption.

The Uniform Adoption Act, the Uniform Parentage Act (UPA), and the Statute Clarifying the Rights of Unwed Fathers in Newborn Adoptions (SCRUFNA) offer model legislation for paternity registries.[63] The Uniform Adoption Act contains a registry and prohibits compelling a birth mother to reveal the name of the father, although the court must admonish her on the dangers of delay and detriment to the child that could result from her failure to name the father.[64] The Act also provides a civil penalty to the birth mother who knowingly names the wrong father.

SCRUFNA, which was proposed by commentator Scott Resnik, does not require the birth mother to name the father and provides notice to every man who registers within thirty days of a birth.[65] SCRUFNA, which is intended to override or replace state law, provides that sexual intercourse constitutes notice of a possible pregnancy and requires that men must file a paternity action to secure paternal rights.[66] SCRUFNA requires placement of a newborn whose parents do not both consent to the adoption in foster care for thirty days.[67]

The Uniform Parentage Act contains a paternity registration

63. UNIF. ADOPTION ACT § 3-304 (amended 1994), 9 U.L.A. 74-75 (1999); UNIF. PARENTAGE ACT § 401-23 (amended 2000), 9B U.L.A. 321-27 (2001); Scott A. Resnik, *supra* note 3, at 380 (proposing SCRUFNA).

64. UNIF. ADOPTION ACT § 3-304, *supra* note 63.

65. *See* Resnik, *supra* note 3, at 424-25.

66. SCRUFNA also proposes new grounds for termination of paternal rights in newborn adoptions: physical abuse of the mother during her pregnancy, conviction for a violent felony within the last ten years, and spurning the birth mother's request for assistance during the pregnancy. *See id.* at 426.

67. Countless articles and books are devoted to analysis of the bonding process between infants and their parents between birth and one month of age. *See, e.g.*, Lawrence B. Smith, *Bonding and Attachment—When It Goes Right*, WASHINGTON PARENT MAGAZINE, http://www.washingtonparent.com/articles/9711/bonding.htm (last visited April 23, 2002). Child development specialists also describe the acquisition of many skills in infants from birth to one month of age. *See The Child Development Web, at* http://www.childdevelopmentweb.com/Milestones/milestones.asp (last visited April 23, 2002). Scholars appear to agree that bonding and the acquisition of child development skills between birth and one month are important. SCRUFNA's proposal to place children in foster care for one month awaiting putative father registration does not advance the infant's bonding with her parents and transferring her custody to an adoptive home at one month interrupts the acquisition of skills.

requirement and requires notice of an adoption to the man who registers prior to or within thirty days of birth.[68] Adoptive petitioners are required to search the registry for the child under one year of age whose father has not established a relationship with her.[69] The same section requires the adoptive petitioner to search a second State's registry if the child's conception occurred or may have occurred in a second State. The effect of the non-registration upon a putative father is that his parental rights may be terminated without notice to him if the child is under one year of age. He is not required to register if, prior to the court's termination of his parental rights, he has established a relationship with the child under the UPA or he has filed a paternity action for the child.[70] The UPA provides a model for state registries but does not contemplate a linking national database.

D. Burdens and Benefits of Putative Father Registries

Notice is actually two part—disclosure of the pregnancy differs from notice of the adoption. Consequently, men may fail to register because they do not know 1) that they have conceived a child, 2) that the registry requirement exists, or 3) that an adoption is planned. Critics of registries argue that few men know of registries or the need to file to protect their rights. Some States have enacted laws requiring greater publicizing of their registries.[71] Also, women may conceal their pregnancy from men or otherwise misrepresent the situation. Additionally, filing with the paternity registry in State A does not entitle a man to notice of an adoption petition filed in State B, where the mother may have moved with her child or to deliver her baby.

These critiques raise certain legal, social, and civil rights questions. First, whether ignorance of the putative father registry requirement excuses a man's failure to register. Second, whether sexual intercourse constitutes adequate notice

68. UNIF. PARENTAGE ACT, §§ 402(a), 415.

69. *Id.* at § 421.

70. *Id.* at §§ 404, 402.

71. GA. CODE ANN. § 19-11-9(d)(5) (2001); IND. CODE § 31-19-5-14 (2000); MINN. STAT. § 259.52 (1998); MO. REV. STAT. § 192.016(7)(2)(3) (2001); MONT. CODE ANN. § 42-2-202 (1999); NEB. REV. STAT. § 43-104.01 (1999); OHIO REV. CODE. ANN. § 3107.062 (2000); OKLA. STAT. tit. 10, § 7506-1.1(J)(2) (2001). *See infra* Chart of State Statutes Describing Paternity Registries.

to a man that he may have conceived a child. Third, whether compelling a woman to name the father of her child invades her privacy. Fourth, whether a father's prebirth abandonment of the mother or physical abuse of the mother during pregnancy provides constitutional grounds for foreclosing or limiting his parental rights. Finally, whether filing with the registry is too burdensome, and whether States should compel fathers to file a paternity action in addition to filing with the registry. Because the Supreme Court has declined to review contested infant adoption cases, diverse state laws and cases have determined the answers to most of these questions.[72]

The most litigated civil rights issues raised by putative father registries relate to the putative father's ignorance of the conception, the birth, or of the registry requirement, and the burdens of the registry requirement. In *Lehr v. Robertson*,[73] the Supreme Court ruled that the possibility that a putative father may fail to register because of his ignorance of the registry requirement did not make New York's putative father registry law unconstitutional or apparently suffice to excuse the father's inaction. The Court reasoned that a more open-ended notice requirement would burden adoptions, threaten the unwed birth mother's privacy, and impair the finality of adoptions.[74] State decisions have dealt with similar issues and echo *Lehr*.[75] States have begun to assume the theory that sexual intercourse in itself fairly serves as constructive notice of the possibility of a pregnancy and some state statutes now provide that sexual intercourse serves as notice of a conception or the possibility thereof.[76] In other States, courts have developed case law to the

72. *See* Resnik, *supra* note 3, at 388-89.

73. 463 U.S. 248 (1983).

74. *See id.* at 265 (cited in Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 207 (Utah 1984)).

75. Michigan held that the mother had no duty to inform the unwed father of the birth of the child. *In re* TMK, 617 N.W.2d 925, 926-27 (Mich. Ct. App. 2000). Nebraska held that ignorance of the five day putative father registry requirement did not excuse the failure to register even where the mother initially hid her pregnancy and later misrepresented her intentions to relinquish the infant to adoption to the putative father, because the father knew of the birth. Friehe v. Schaad, 545 N.W.2d 740, 747 (Neb. 1996).

76. ARIZ. REV. STAT. § 8-106.01(F) (1997); GA. CODE ANN. §19-8-12(a)(6) (2001); MONT. CODE ANN. § 42-2-204(1) (1999); 750 ILL. COMP. STAT. 50/12.1(g) (2001); OHIO REV. CODE ANN. § 3107.061 (2000); MINN. STAT. § 259.52(8) (1999); TEX. FAM. CODE ANN. § 160.254 (2001); IDAHO CODE § 16-1505(f)(2) (1999); UTAH CODE ANN. § 78-30-4.13(1)(2000). New Jersey has no putative father registry but provides that an act of sexual intercourse constitutes constructive notice (for due process

same effect—that sexual intercourse serves as constructive notice of a pregnancy.[77] Some States provide a good faith exception such that a man is entitled to additional notice over and above sexual intercourse itself if he is actively deceived in his efforts to investigate whether he conceived a child.[78]

The question of the burdens imposed by putative father registry requirements was discussed by an Alabama court, which upheld a putative father registry and quoted favorably the description of a commentator:

> The burden placed on putative fathers under Illinois's [putative father registry] legislation is not necessarily out of step with modern mores or the realities of contemporary heterosexual relationships. Neither is it completely unrealistic. To meet the burden which the new legislation places on a putative father, he need neither remain in contact with a woman with whom he has had sexual intercourse, nor turn to other sources of information to determine whether he has conceived a child with her. Under the new legislation, a putative father need only file with the putative father registry based on his knowledge that he has had intercourse with a woman and commence a parentage action within thirty days of that filing. His interests will not be jeopardized if he ends relations with her, and his social habits are not, therefore, greatly affected. By simply mailing a postcard to the registry and commencing a parentage action, tasks which can hardly be labeled a burden, a putative father can preserve his rights to notice and consent.[79]

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purposes) that a man may have conceived a child as a result of his acts—unless the mother actively deceives him and thwarts his efforts to find her thereby activating the statutory fraud protections. N.J. STAT. ANN. § 9:3-46 (West 2000). An Ohio dissent discussed extensively that state's statute providing that sexual intercourse with a woman puts a man on notice that if a child is born as a result and the putative father fails to file with the registry, the child may be adopted without his consent pursuant to law. *In re* Adoption of Baby Boy Brooks, 737 N.E.2d 1062 (Ohio Ct. App. 2000).

77. *See In re* Paternity of Baby Doe, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000); Robert O. v. Russell K., 604 N.E.2d 99 (N.Y. 1992); *In re* Adoption of S.J.B, 745 S.W.2d 606 (Ark. 1988). In Michigan Supreme Court Justice Levin's dissent in the Baby Jessica case, he indicated that putative fathers know that sexual intercourse may result in pregnancy and thus of the opportunity to establish a family and the need to protect that opportunity. *See In re* Clausen, 502 N.W.2d 649, 687 (Mich. 1993) (Levin, J., dissenting).

78. *See infra* notes 142-48 and accompanying text.

79. Mahrukh S. Hussaini, *Incorporating Thwarted Putative Fathers into the Adoption Scheme: Illinois Proposes a Solution After the "Baby Richard" Case*, 1996 U. ILL. L. REV. 189, 220 (1996), *quoted in* M.V.S. v. V.M.D., 776 So.2d 142, 151 (Ala. Civ. App. 1999).

Hussaini examines the putative father registry requirement in the context of modern sexual mores and suggests they do not unduly burden the unmarried father. Whatever burden putative father registries impose on unmarried fathers is offset by the protections offered to them. In an Arkansas contested adoption opinion, a justice on the State's Supreme Court actually called for the development of a registry so that the State's putative fathers would have the procedural due process safeguards that New York laws afforded Lehr.[80]

While most registries guarantee notice to the father who registers and not to the father who fails to register, an increasing number of States compel the unwed father to legally establish paternity or risk losing rights to contest an adoption.[81] Failure to establish paternity may result in automatic termination of parental rights or the loss of the right to consent to an adoption.[82] In *Quilloin v. Walcott*,[83] the Supreme Court held constitutional a Georgia statue requiring an unmarried father to legitimate the child in order to have veto rights over the adoption. Ohio has held that a father preserved his right to consent to an adoption where he established paternity prior to the filing of an adoption petition even though he failed to file with the putative father registry within thirty days of birth.[84] A considerably greater burden is involved in requiring the registering father to file a paternity action as well. This burden is offset by its advancement of the best interests of the child, because such requirements result in orders of child support, custody, and visitation and do not permit the father to thwart the adoption without assuming paternal obligations.

Putative father registries also raise issues with respect to the rights of birth mothers, including the privacy right of a woman in not naming the man or men who have or could have fathered her child:[85] in not naming the man who has raped her,

80. *In re* Adoption of S.J.B., 745 S.W.2d 606, 612 (Ark. 1988).

81. *See infra* Chart of State Statutes Describing Paternity Registries.

82. IND. CODE §§ 31-19-5, 31-19-9-12 (2000), provides that a man must register with the putative father registry within thirty days of notice of a planned adoption or suffer automatic loss of parental rights. *Cf.* MO. REV. STAT. § 453.030 (2000) (holding that a man who does not register loses his rights to consent to an adoption).

83. Quilloin v. Walcott, 434 U.S. 246 (1978).

84. *In re* Adoption of Baby Boy Brooks, 737 N.E.2d 1062 (Ohio Ct. App. 2000).

85. The privacy interest of an unwed mother not to name the father of her child was affirmed in *Lehr v. Robertson*, 463 U.S. 248, 248, 265-65 (1983), and in *Robert O.*

and the safety right of a woman in not naming the abusive father who may jeopardize her safety or the safety of her child.[86] A woman's right to keep private the identities of the man or men with whom she has had sexual intercourse is disregarded by some judges who coerce her to name the father.[87] Such a requirement is faulty because it tramples the mother's right to privacy, assumes that a mother can accurately name the father, and induces potential fathers to rely upon the mother's accuracy or honesty.[88]

A child's rights are affected by the putative father registry requirement, in that her opportunity to be parented by her biological father may be foreclosed by his failure to register.[89] A

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v. Russell K., 604 N.E.2d 99, 104 (N.Y. 1992).

86. Studies on the prevalence of domestic violence "suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA COUNCIL ON SCIENTIFIC AFFAIRS, VIOLENCE AGAINST WOMEN 7 (1991), *reprinted in* BATTERED WOMEN AND THE LAW 5, 5 (Clare Dalton & Elizabeth M. Schnider eds., 2001). Coerced pregnancy is commonplace in abusive relationships. *See* Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 L. & POL'Y 205, 215-17 (1997). Perpetrators of domestic violence seek control over their victims. *See* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 146 SMU L. REV. 2117 (1993), *reprinted in* BATTERED WOMEN AND THE LAW, *supra*, at 57. "[Seventy-one percent of babies born to teen mothers] are fathered by men over the age of twenty. Many of these pregnancies result from abuse . . . . 'Consensual' sex between an underage youth and an adult presents a high risk of abuse." Maria L. Imperial, *Self-sufficiency and Safety: Welfare Reform for Victims of Domestic Violence*, 5 GEO. J. ON FIGHTING POVERTY 3, 12 (1997). A mother of young children is a dependent woman and an easy target for abusive control. Relinquishment is likely to threaten his control and thus aggravate an abusive man. Identifying such a man as a father poses a safety threat to relinquishing mothers.

87. Judges who insist that the mother reveal the name of the father (even a seriously abusive father) or refuse to approve the mother's consent to adoption or transfer of custody of the infant create a particularly coercive situation; forcing the judge's hand in such a case requires a writ of mandamus to the appellate court, which is time consuming at a point where time is of the essence (i.e., the newborn adoptee may remain in the hospital or with a foster family during the writ). Such delay causes anguish in a relinquishing mother who is typically anxious to know her child is in the loving arms of her intended parents. Under challenge, state courts protect a woman's right to privacy in not naming or notifying the father of the pregnancy, while upholding the putative father registry requirements. *In re* Adoption of S.J.B., 745 S.W.2d 606, 609 (Ark. 1988); *In re* Paternity of Baby Doe, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000); *In re* T.M.K., 617 N.W.2d 925, 927 (Mich. Ct. App. 302).

88. A relinquishing mother who has been under the influence of alcohol or date rape drugs at the time of conception is unable to name the man or men who may have fathered her children. Additionally, her knowledge of biology may be poor, with the result that she misnames a man as the father because she has had intercourse with him more frequently, she cannot remember the date of her last menses, or she likes him better.

89. *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989). In this case, the Supreme Court noted that it had never decided whether a child has a liberty

line of Supreme Court cases protects a father's rights to a child with whom he has established a relationship.[90] However, these cases deal with children, not newborns, and putative father registries affect paternal rights to newborn children as well to older children. The registry's ability to foreclose rights of men to newborns raises questions of exactly what constitutes a relationship with a newborn. Questions include whether failure to register is the same as failure to establish a relationship; whether failure to establish a relationship with an unborn child is equivalent to failure to establish a relationship with a newborn; and whether such failure is in fact pre-birth abandonment.[91] Some state statutes, case law, and SCRUFNA provide that pre-birth abandonment is grounds to foreclose the father's rights.[92] Some States provide that failure to register

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interest in maintaining her filial relationship and declined to do so where a child claimed a due process right to maintain two fathers (one biological and one the husband of her mother) in California where a statute created a presumption that a child's father is the man who is both married to and living with the mother at the time of the child's birth. *Id.* at 130-31.

90. *See infra* Part III.A.

91. New York cases have defined what conduct constitutes a relationship with a newborn, including pre-birth activities. Determining whether a man formed a relationship with a newborn may include such factors as whether he paid the medical bills related to the pregnancy, whether he held himself out as the father, and perhaps most significantly whether his manifestations of willingness took place promptly. Robert O. v. Russell K., 604 N.E.2d 99, 102 (N.Y. 1992). To establish a relationship with a newborn that merits constitutional protection, the father must come forward to immediately assume parental responsibilities and he must do so in a prompt and substantial manner, including public acknowledgment of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child. *In re* Raquel Marie X., 559 N.E.2d 418, 425-26 (N.Y. 1990).

92. Alabama codified that pre-birth abandonment is implied consent to adoption and includes the failure of the father, with reasonable knowledge of pregnancy, to offer financial assistance and/or emotional support. ALA. CODE § 26-10A-9 (2001). Idaho codified that an unmarried biological father is not a necessary party if he had actual knowledge of pregnancy but did not pay a fair and reasonable amount of the expenses incurred in the pregnancy and the birth, in accordance with his means. IDAHO CODE §16-1504-2(b)(iii) (1999). Kansas codified that pre-birth abandonment is grounds for termination of parental rights where the father had knowledge of the pregnancy but failed to provide support for the mother during the six months prior to the child's birth. KAN. STAT. ANN. § 59-2136(h)(4) (2001). Nebraska codified that consent of the father is not necessary where he had knowledge of the pregnancy, but failed to provide reasonable support for the mother during the pregnancy. NEB. REV. STAT. § 43-104.22(5) (2001). Ohio law states that pre-birth abandonment forecloses a putative father's right to object to the adoption. OHIO REV. CODE ANN. § 3107.06 (Anderson 2000). Texas codified pre-birth abandonment as abandonment of the mother during the pregnancy, and continuing through the birth, by a father's failure to provide adequate support or medical care for the mother and remaining apart from the child or failing to support the child after the birth. TEX. FAM. CODE ANN. § 161.001(1)(H) (Vernon 2001). Utah statutory law also provides that payment of

with the putative father registry is the same as pre-birth abandonment.[93]

Foreclosing a biological father's opportunity to parent a child has advantages and disadvantages to a child, who has the presumed need for a father. The disadvantage is the loss of a relationship with a biological father. The advantage is the establishment of a legally secure relationship with a committed father. The assumption is that the man who fails to register signals the likelihood that he will also fail to assume legal responsibility for the child. The man who does not establish paternity may pay child support regularly, may pay when it is convenient, or may not pay at all, cannot add the child to his health insurance (without proof of paternity), has no legal right to authorize health care, and may or may not exercise custody or visitation rights. In enacting putative father registries, States indicate their preference for the adoptive father who assumes legal responsibility for the child over the biological father who fails to formally establish paternity and whose relationship to the child is a casual or intermittent one.[94]

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expenses related to pregnancy and birth in accordance with the father's means is a requirement to establish the necessity of his consent to adoption. UTAH CODE ANN. § 78-30-4.14(2)(b)(iii) (2001). Utah case law also provides that pre-birth abandonment can be evidenced by a failure to provide medical care and financial support and not establishing paternity. *In re* Adoption of B.B.D., 984 P.2d 967, 970 (Utah 1999). (2001). Wisconsin set out the following factors to determine if a man had not established a liberty interest in his unborn child: a father's physical assault upon the mother during her pregnancy, neglect to provide care and support during the pregnancy even though the father had the opportunity to do so, failure to attempt to contact the child, write to persons caring for her, or send cards or gifts, and failure to contribute financially toward medical expenses or delivery. Christopher C. v. Lori C., No. 92-2782-FT, 1993 WL 138160, at ***4 (Wis. Ct. App. 1993). Additional factors evincing pre-birth abandonment might include the failure to provide emotional and physical support to the mother during the pregnancy, the failure to purchase items necessitated by the pregnancy, such as maternity clothing, and the failure to pay for prenatal medical care or to provide transportation to and from medical care. *See* Resnik, *supra* note 3, at 426-27.

93. Utah provides that failure to register constitutes abandonment and a waiver and surrender of any right to notice of, or to a hearing in any judicial proceeding for, the adoption of a child. In such cases the consent of such father to the adoption is not required. UTAH CODE ANN. § 4.14(2)(b) (2001).

94. A Utah court described the state's interest in speedily identifying those persons who will assume parental roles over children and discussed policy implications that must limit the rights of biological fathers. *See* Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 203 (Utah 1984). *See also* UNIF. PARENTAGE ACT §§ 402, 404, 9 U.L.A. 322-23 (2000).

III. PUTATIVE FATHER REGISTRY — APPLICABLE CASE LAW

A. Case Law on the Rights of Unwed Fathers

The Supreme Court has decided several cases defining the constitutional rights of unwed fathers. In *Stanley v. Illinois*,[95] the Supreme Court held in 1972 that the State could not remove children from the custody of an unwed father in a dependency case, after their mother's death, absent a hearing and a particularized finding that the father was an unfit parent. In *Stanley*, the several children had lived with their father over a period of time as long as eighteen years since birth.[96]

In *Quilloin v. Walcott*,[97] the Court held in 1978 that a Georgia court did not violate an unwed father's substantive rights when it applied a 'best interests of the child' standard where the father had not legitimated the child, had never taken custody of the child, and had not shouldered any significant responsibility for the child's rearing.[98] The child in *Quilloin* was eleven years of age.[99]

In *Caban v. Mohammed*,[100] the Court held that an unwed father only acquires substantial protection under the Due Process Clause when he demonstrates a full commitment to the responsibilities of parenthood by actively rearing his child. The children in *Caban* were four and six-years-old.[101] In *Caban*, as in *Quilloin*, the State's statutory law provided that only the mother's consent, and not the father's, was necessary for an adoption of a child born out of wedlock. The *Caban* Court struck down the New York statute on equal protection grounds,[102] whereas the *Quilloin* Court expressly did not consider the gender based distinction vis-à-vis the equal protection claim because it was not presented.[103]

These decisions hold that unwed fathers have an inchoate interest in their children which they can transform into a

95. 405 U.S. 645, 649 (1972).
96. *Id.* at 646.
97. 434 U.S. 246 (1978).
98. *Id.* at 255-56.
99. *Id.* at 249.
100. 441 U.S. 380, 392 (1979).
101. Lehr v. Robertson, 463 U.S. 248, 267 (1983) (referring to *Caban*).
102. *Caban*, 441 U.S. at 393.
103. *Quilloin*, 434 U.S. at 253 n.13.

constitutionally protected interest only if they assume substantial parental responsibilities.[104] All the children considered in these Supreme Court unwed-father cases were beyond infancy. The *Caban* Court specifically withheld judgment as to whether newborn adoptions would justify "setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment."[105] State legislatures subsequently revised their adoption statutes to comply with these cases as predicted by Justice Stevens in the *Caban* dissent.[106]

B. Putative Father Registry Case Law

Four years later, in 1983, the Court reviewed the next unwed father case that is the leading case analyzing putative father registries. In *Lehr v. Robertson*,[107] the Court addressed the constitutionality of New York's putative father registry in the context of an adoption proceeding. The New York statute provided notice to certain categories of men, including men who had filed with the putative father registry, and excluded those men who had not filed and did not fall into any other category of presumed father.[108] The Court held that where the putative father had not filed with the putative father registry nor established a substantial relationship with his child, the State's failure to give him notice of a pending step-parent adoption proceeding did not deny him due process or equal protection. The rationale was that the statutes afforded him the opportunity to develop a protected relationship and guaranteed him notice of the adoption by filing with New York's registry.[109] The child in *Lehr* was over two years of

104. *See also* Michael H. v. Gerald D., 491 U.S. 110, 131-32 (1989) (holding that California's statutory presumption of paternity in the man married to and living with a child's mother at the time of birth may prevent a biological father from asserting his paternity and establishing a relationship with his biological child).

105. *Caban*, 441 U.S. at 392 n.11.

106. *Id.* at 416 (Stevens, J., dissenting).

107. Lehr v. Robertson, 463 U.S. 248, 249-50 (1983).

108. *Id.* at 251. The other categories of men entitled to notice included: those who had been adjudicated to be the father, those who had been identified as the father on the child's birth certificate, those who had lived openly with the child and the child's mother and who had held themselves out to be the father, those who had been identified as the father by the mother in a sworn written statement, and those who had married the child's mother before the child was six months old. *Id.*

109. *See id.* at 264.

age.[110] Other relevant facts include that the state authority knew the father's whereabouts; the father had never supported the child and rarely visited her; and the father filed a paternity action after the ultimately successful step-parent adoption was filed.[111]

The putative father alleged two grounds upon which the trial court's action in finalizing the adoption without notice to him was unconstitutional. First, he advanced a due process challenge premised upon his allegation that his actual or potential relationship with the child was an interest in liberty that could not be destroyed without due process of law and that the statute's failure to provide him notice and an opportunity to be heard deprived him of that liberty interest without due process.[112] Second, the father argued that the putative father registry statute denied him the right to consent to the adoption and accorded him fewer procedural rights than the mother and that this gender-based classification violated the Equal Protection Clause.[113]

The Court held that the New York putative father registry law did not violate an unwed father's liberty interest in developing a relationship with his child in that it required notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children.[114] "[T]he right to receive notice was completely within appellant's control."[115] The Court reiterated that a biological connection alone does not trigger full constitutional protection, and that only when an unwed father demonstrates a full commitment to the responsibilities of parenthood by participating in the rearing of his child does his interest in personal contact with his child acquire substantial protection under the Due Process Clause.[116] Lehr had not demonstrated a commitment adequate to transform his inchoate interest into a constitutionally protected interest and so his due process challenge failed. The trial court could rely upon the statutory

110. *Id.* at 248.
111. *Id.*
112. Lehr v. Robertson, 463 U.S. 248, 255 (1983).
113. *Id.*
114. *See id.* at 263-65.
115. *Id.* at 264.
116. *Id.* at 261.

notice requirement even though Lehr had subsequently filed a paternity action in another court, because the State's legitimate interests in facilitating the adoption of children justified strict compliance with the procedural requirements of the statute.[117] The *Lehr* court indicated that the possibility that a putative father may fail to register because of his ignorance of the registry requirement did not make the law unconstitutional or suffice to excuse the father's inaction, because a more open-ended notice requirement would burden adoptions, threaten the unwed birth mother's privacy, and impair the finality of adoptions.[118] State decisions have echoed *Lehr*'s holding as to ignorance of the law. The Nebraska Supreme Court held that a five-day limitation imposed by that State's putative father registry was constitutional despite the father's excuse that he did not know of the limitation, because all citizens are presumed to know the law and "[s]tatutes of limitation bar evenly the claims of the wary and the unwary and the just and the unjust."[119]

Lehr's equal protection challenge was based upon gender in that he alleged the New York registry scheme impermissibly treated mothers and fathers differently.[120] The legislation guaranteed certain classes of people the right to veto an adoption, but even though all mothers fell within the favored class, only some fathers did. The Court observed that laws "may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose."[121] It went on to hold, however, that the registry legislation was intended to establish adoption procedures that promote the interests of children and that such legislation could treat unwed mothers and fathers disparately if the father had either abandoned the child or never established a relationship with her.[122] Lehr's challenge failed because it was his own failure to establish a substantial relationship that removed him from the protected class. Where the mother and

117. *See id.* at 264-65.

118. Lehr v. Robertson, 463 U.S. 248, 265 (1983). The *Lehr* court's concern for the birth mother's privacy was later cited in *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 207 (Utah 1984).

119. Shoecraft v. Catholic Soc. Servs. Bureau, 385 N.W.2d 448, 452 (Neb. 1986).

120. *See Lehr*, 463 U.S. at 266.

121. *Id.* at 266 (citing Craig v. Boren, 429 U.S. 190, 197-99 (1976)).

122. *Id.* at 267-68.

father are similarly situated, the statute must treat them equally, but where the father fails to assume parental responsibilities, putative father registry notice provisions legitimately do not offend equal protection.[123]

State cases challenging due process in putative father registries allege constitutional violations. All courts to date have found registries constitutional, although courts have found the application of registry requirements unconstitutional with reference to certain fact patterns.[124]

State cases have held that notice is not required to unwed fathers who have not established a relationship with the child nor filed with a putative father registry, without regard for the length of time permitted by the deadline. Nebraska courts have found that notice was not required for fathers who had exceeded the five day registry period if they knew of the pregnancy/birth, had not indicated any intention to assert their rights, and had not provided support during the pregnancy or natal period.[125] The Utah Supreme Court upheld the constitutionality of a putative father registry where the notice of paternity had to be filed prior to the date the child was released to the adoption agency, which was two days after birth.[126] The Indiana Court of Appeals recently held the Indiana putative father registry scheme constitutional against a due process challenge where a father filed twenty-three days after the birth.[127] The Indiana statute provides a thirty day registration limit after the father has been served with notice of the putative father registry requirement.[128] The father was served seven weeks prior to the birth, so his time had run before the baby's birth.[129] Finally, the Oregon Court of Appeals

123. *See id.* at 266-67.

124. *See, e.g., In re* S.R.S., 408 N.W.2d 272, 272 (Neb. 1987) (holding putative father registry requirement unconstitutional where unmarried father had daily contact with the child for the first nineteen months of child's first twenty-four months); *In re* Paternity of Baby Girl P.D., 661 N.E.2nd 873, 874-75 (Ind. Ct. App. 1996) (holding inapplicable statute requiring registration within thirty days where statutorily required notice was not provided).

125. *See* Shoecraft v. Catholic Soc. Servs. Bureau, 385 N.W.2d 448, 452 (Neb. 1986); *see also* Friehe v. Schaad, 545 N.W.2d 740, 747 (Neb. 1996) (upholding the constitutionality of the five day registration period).

126. *See* Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 204 (Utah 1984).

127. Wachowski v. Beke (*In re* M.G.S), 756 N.E.2d 990 (Ind. 2001).

128. IND. CODE ANN. § 31-19-9-15(a) (Michie 2001).

129. *Wachowski*, 756 N.E.2d at 996. The father did not register until over two months after receiving notice. *Id.* at 995-96. The father testified that he delayed

held that a California resident's failure to file a notice of paternity in Oregon barred him from receiving notice and removed his right to consent to the adoption, even though he had filed a paternity action in California.[130]

Courts have also upheld the constitutionality of the termination of rights when there is a failure to register regardless of the mother's identification and notification of the father. The Oklahoma Supreme Court upheld a putative father registry notice provision where the mother failed to name the father, even though she apparently knew his identity and whereabouts.[131] The Illinois Appellate Court held that a putative father was not excused from the ten-day putative father registry requirement, given he had knowledge of the pregnancy and the possibility that he could be the father.[132] Louisiana provided a hearing for an Indiana putative father to prove his fitness and commitment to parental responsibilities despite filing late for a child born in Louisiana to an Indiana birth mother where the father executed an authentic "Act of Acknowledgment" in Louisiana, filed an opposition to the adoption, and filed with the putative father registry in Louisiana.[133]

Putative father registries have also withstood constitutional challenges based on the Equal Protection Clause. In *M.V.S. v. V.M.D.*,[134] the father alleged a statute violated the Equal

registering because of the birth mother's statements that adoption was just one option she was considering. *Id.* The court was not persuaded because the registry requirement notice contained a statement that "nothing that the mother of the child or anyone else may [say] about her intentions regarding a possible adoption of the child can relieve [the father] of the obligations imposed upon [the father] having received . . . notice." *Id.* at 995. The opinion contains an invitation to the General Assembly to amend the law to avoid the strict statutory interpretation that the court felt constrained to deliver. *Id.* at 1000. The legislature has not yet responded. Adoption attorney Steve Kirsh, who is closely involved in Indiana adoption legislation, expects no legislative response to the court's invitation. Interview with Steven M. Kirsh, Treasurer, American Academy of Adoption Attorneys (May 1, 2002).

130. *See* Hylland v. Doe, 867 P.2d 551, 555-56 (Or. App. 1994).

131. *In re* C.J.S., 903 P.2d 304, 305 (Okla. 1995).

132. *In re* K.J.R., 687 N.E.2d 113, 118 (Ill. App. Ct. 1997).

133. *In re* R.E., 642 So.2d 889, 892 (La. Ct. App. 1994). Interestingly, the opinion noted that the Louisiana Children's Code § 1138 provided that if the trial court establishes the putative father's parental rights and he refuses to consent to the adoption, the trial court *shall* order him to reimburse the department or the licensed private adoption agency of all medical expenses incurred for the mother and the child in connection with the birth. *Id.* The Children's Code was amended in 2001 to make such an order discretionary for the trial judge. 2001 La. Acts 910.

134. 776 So.2d 142, 145 (Ala. App. 1999).

Protection Clause because men who registered with the putative father registry were treated differently than those who did not register. The Alabama court applied rational basis scrutiny and held that treating these fathers differently was permissible because it reasonably advanced a legitimate government interest: the provision of "a legal means to ascertain within a short time of a child's birth whether the biological father is going to assert his rights and perform his corresponding duties."[135]

Applying a strict scrutiny analysis, the Nebraska Supreme Court similarly upheld the differential treatment afforded unwed mothers versus unwed fathers under registry laws.[136] The court analyzed the effect of birth upon a mother, the effect of the five-day limit imposed by that State's putative father registry, and the effect of a rapid determination of parental rights upon the best interests of the child. The court concluded that the legislation accomplished related goals and addressed legitimate concerns.[137] Thus, the statute was constitutionally applied.

C. Impossibility Exception Case Law

A number of state courts have established impossibility exceptions for the father whose efforts to parent the child were affirmatively thwarted. These exceptions cover situations including: (1) where the father did not know the mother was pregnant; (2) where the mother misrepresented the situation to the father such that she indicated falsely that she was not pregnant or that he was not the father; and (3) where the mother moved from the State of conception to a second State for delivery.

Where fathers have requested impossibility exceptions due to lack of knowledge of the pregnancy, courts have denied them if the father made no attempt to investigate the possibility of pregnancy. For example, South Dakota withheld an

135. *Id.* at 153.

136. *See* Shoecraft v. Catholic Soc. Servs. Bureau, 385 N.W.2d 448, 451 (Neb. 1986).

137. *See id.* at 452. Although the court describes its reasoning as strict scrutiny, the section of the opinion that focused on the 'narrow tailoring' aspect of heightened scrutiny in fact seems to operate more like a rational basis test, or at best, intermediate scrutiny. *Id.*

impossibility exception for a father's failure to assert paternity within sixty days of the birth, despite lack of notice by the mother, where the father did not investigate to see if conception occurred, did not support the mother during her pregnancy, and did not take immediate action when he learned of the child.[138] New York also withheld the impossibility exception from a man where he took no "steps to discover the pregnancy or the birth of the child before first asserting his parental interest ten months after the adoption became final."[139] New York specifically denied the father's claim that the mother had a duty to ensure he knew of the birth given that the mother made no attempts to conceal her whereabouts or her pregnancy.[140] Utah codified a similar rule, whereby a man is deemed to be on notice that a pregnancy and adoption proceeding may occur simply by virtue of having engaged in a sexual relationship with a woman.[141]

Fathers have also requested impossibility exceptions where they knew the locations of the mothers but the mothers had misrepresented the identity of the father to either the father or to some third party. For example, Arkansas held a father to its registry requirement where the mother falsely swore in her petition for step-parent adoption that the father was unknown.[142] In a slightly different situation, Illinois provided no impossibility exception where the father knew of the existence of the eighteen-month-old child but took no action to pursue the possibility of his own paternity because the mother and her family told him that another man was the father.[143] Under similar circumstances and in the same year, Illinois again denied the impossibility exception even though the mother falsely indicated that the father was another man,

138. *See In re* Baby Boy K., 546 N.W.2d 86, 99-100 (S.D. 1996). The court noted that the mother misrepresented to the court that she did not know the identity of the father and that the father and mother's relationship lasted only 2 weeks after which father did not attempt to contact the mother to determine if she was pregnant. *See id.*

139. Robert O. v. Russell K., 604 N.E.2d 99, 100 (N.Y. 1992) ("Inasmuch as petitioner failed to take any steps to discover the pregnancy or the birth of the child before first asserting his parental interest ten months after the adoption became final, we conclude he was neither entitled to notice nor was his consent to the adoption required.").

140. *See id.* at 101.

141. *See* UTAH CODE ANN. § 78-30-4.13(1) (2001).

142. *See In re* Adoption of Reeves, 831 S.W.2d 607, 609-10 (1992).

143. *See In re* A.S.B., 688 N.E.2d 1215, 1222 (Ill. App.Ct.1997).

because the putative father knew of the pregnancy and the possibility of his own paternity but did not file with the registry.[144] The *K.J.R.* court articulated the statutory elements of the Illinois impossibility exception to include when: (1) registration with the putative father registry within the time period specified by the State was not possible; (2) failure to register was through no fault of the father; and (3) the father registered within ten days after it became possible for him to file.[145] The *K.J.R.* court specifically reiterated the Illinois statutory language that a lack of knowledge of the pregnancy or birth does not constitute an acceptable reason for failing to register.[146] Minnesota denied an exception to the registry requirement where the mother wrote the father that she was planning to terminate her pregnancy and he did not learn of the child until after the mother gave birth and relinquished him to adoption.[147] In another instance, Nebraska disregarded a mother's misrepresentation to the adoption agency that the father's identity was unknown and held that a certificate from the putative father registry could substitute for the father's consent.[148]

Fathers have also requested impossibility exceptions because mothers traveled among States and therefore made it difficult for them to know in which jurisdiction to assert their paternity. In 1980, Utah held in *Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints*[149] that "due process requires that an [unwed father] be permitted to show that he was not afforded reasonable opportunity to comply with the [registry requirement]."[150] The court hinted that two elements must exist for such an exception to apply: (1) timely filing with

144. *In re* K.J.R., 687 N.E.2d 113, 117-18 (Ill. App. Ct. 1997).

145. *Id* at 117.

146. *Id.*

147. *See In re* Paternity of J.A.V., 547 N.W.2d 374, 375-77 (Minn. 1996). While denying the father future notice of the adoption proceedings because of his failure to file with the registry, the court permitted him to establish paternity. *See id.* at 375.

148. *See In re* Adoption of Kassandra B., 540 N.W.2d 554, 555, 560 (Neb. 1995). Although the court stated a certificate from the putative father registry could have substituted for the father's consent, no such certificate was filed in this case. *See id.*

149. 615 P.2d 1250 (Utah 1980).

150. *Id.* at 1256 (holding that an unwed father was denied due process because the court did not afford him the opportunity to show that he could not have reasonably expected his baby to be born in Utah).

the registry was impossible for the father; and (2) the father's failure to file was through no fault of his own.[151] In *Ellis*, a couple conceived in California and the mother moved to Utah for the birth of the child without notifying father of where she would give birth. Under these circumstances, Utah held that an impossibility exception may be warranted and remanded to the lower court to allow the father the opportunity to prove he could not have reasonably expected the baby to be born in Utah. Fourteen years later, Oregon reached a contrary decision under nearly identical facts. In *Hylland v. Doe* (*In re Adoption of Baby Boy Hylland/Ohnemus*),[152] a couple conceived in California and the mother moved to Oregon without notifying the father of where she would give birth. The *Hylland* court did not afford the father an impossibility exception, even though the father had filed a paternity action in California, because he failed to file with the Oregon registry and did not present demonstrative evidence that he had supported or attempted to support the child.[153]

A Minnesota appeals court recently denied an impossibility exception to a father who lived with the birth mother in Iowa and conceived the child in Iowa before the mother moved to Illinois and later to Minnesota, where she lived with her grandparents and later in a home for pregnant teens and where she relinquished the child.[154] The mother did not inform the father of her whereabouts after they parted even though they communicated by email.[155] The birth father asked the mother's parents and friends where she was, but they did not inform him either.[156] The birth father was aware that the birth mother's mother and sisters moved to Minnesota.[157] The Minnesota statute provides notice to the father who files with the putative father registry within thirty days after birth and provides that the father who fails to register within thirty days loses his right to assert any interest in the proceeding and is considered to

151. *See id.*
152. 867 P.2d 551, 553 (Or. Ct. App. 1994).
153. *Id.* at 556-57.
154. Heidbreder v. Carton, 636 N.W.2d 833 (Minn. Ct. App. 2001), *review granted*, 2002 Minn. Lexis 87 (Feb. 19, 2002) (No. C0-01-739).
155. *Id.* at 836.
156. *Id.*
157. *Id.*

have abandoned the child.[158] The father registered with the Minnesota registry on the thirty-first day, which was one day after learning the mother had given birth in Minnesota.[159] The court grounded its denial of an impossibility exception on the father's knowledge of the three States, Iowa, Illinois, and Minnesota, to which the mother had recent ties, that the mother was carrying his child during the pregnancy, that she planned to give birth, the due date, that he and the mother would not marry, and that she did not wish to share her whereabouts with him.[160] The court also commented that the father had nine months to register but did not do so, did not retain a lawyer, did not commence a paternity action, did not register as a putative father in any State, and did not otherwise arrange to become a parent.[161] A distillation of the key variables in Minnesota's decision are that the father had enough information about mother's whereabouts to protect or make a showing of protecting his parental rights in any of three States and did not attempt to establish a legal relationship with his child in any way.

Utah granted no impossibility exception where the mother notified the father that she was moving to Utah from California to give birth and to place the child for adoption, and the father failed to file with the Utah registry.[162] In that case, the putative father filed a paternity action in California but neither filed with the Utah putative father registry nor filed a paternity action in Utah, even though he was aware that the mother and baby were in Utah.[163] Under nearly identical facts, Utah again withheld an impossibility exception where the putative father was a resident of Washington State and was informed by the mother of her move to Utah to live with the prospective adoptive parents.[164] Although he telephoned the birth mother

158. MINN. STAT. § 259-52 (2001). The court held that the mother and father's living together openly did not entitle the father to notice because it occurred before the birth and not after. *Id.* at 837.

159. *Heidbreder*, 636 N.W.2d at 836.

160. *Id.* at 838.

161. *Id.* The father claimed that the mother fraudulently concealed her whereabouts, but this argument did not persuade the court because Minnesota's explicit impossibility exception does not include an express or implied fraud exception. *Id.* at 838-39.

162. *See* Beltran v. Allan, 926 P.2d 892, 894, 898 (Utah Ct. App. 1996).

163. *Id.* at 894-95.

164. *See* C.F. v. D.D. (*In re* Adoption of B.B.D), 984 P.2d 967, 969, 974-75 (Utah

in Utah and attempted to establish paternity by registration in Washington, he did not file with the Utah putative father registry or file any paternity actions in either Washington or Utah.[165] The key variable in these cases was father's knowledge of mother's whereabouts.

In a slightly different situation Utah allowed an impossibility exception for a California putative father where the birth mother notified him of her move to Utah and her plan to relinquish the child for adoption but subsequently misrepresented to him that she would marry him and raise the child with him.[166] The father did not file with the Utah registry nor file a paternity action but was in the process of moving their belongings to a new home when the child was born prematurely and the mother relinquished him to adoption.[167] Additionally, the birth mother's family also misled the putative father.[168] The key variable in this case was that, even though the father knew of mother's whereabouts, she induced his reliance upon her misrepresentation that she would marry him and they would raise the child together.

In yet another moderately different situation, Utah did not allow an impossibility exception where an Indiana putative father filed a paternity action in Indiana one day after the child's birth in Nevada, and, on the same day, the adoptive couple filed their adoption petition in Utah.[169] The putative father did not, however, file with the putative father registry in Utah until eight months after learning of the child's birth and the Utah adoption proceedings.[170] At that time, Utah statutorily required a putative father to file a notice of paternity within ten days after it became possible for him to file.[171] The key variable in this case was the father's delayed filing after acquiring knowledge of the child's whereabouts.

The elements of an impossibility exception vary by State. A mother's fraudulent misrepresentation to the father that she is either not pregnant, or has aborted or miscarried the baby and

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1999).

165. *See id.* at 969.

166. *See In re* Adoption of Baby Boy Doe, 717 P.2d 686, 691 (Utah 1986).

167. *See id.* at 687.

168. *See id.* at 688.

169. *See In re* Adoption of W, 904 P.2d 1113, 1115, 1120-21 (Utah Ct. App. 1995).

170. *See id.* at 1115, 1120.

171. *See id.* at 1118-19 (quoting UTAH CODE ANN. § 78-30-4.8 (Supp. 1990)).

a mother's concealed move to a second State have warranted impossibility exceptions in some but not all cases. A national putative father registry database would provide a means for fathers to protect their rights despite the whereabouts of the mother or her representations to the father in any participating State.

D. Tortious Interference with Parental Rights Case Law

In 1998, the Mississippi Supreme Court decided *Smith v. Malouf*,[172] and the West Virginia Supreme Court decided *Kessel v. Leavitt*.[173] Both cases were tort actions for intentional interference with parental relationships or custody in interstate adoptions. The intentional interference with parental relationships tort is not reserved to adoption situations and is not recognized in all jurisdictions.[174] *Smith* and *Kessel* are important to a discussion of putative father registries because individual state registries can not and did not protect the parties in these cases, but a national putative father registry theoretically would have protected the fathers' rights in both of these cases where the mothers used interstate travel to thwart the fathers' rights.[175]

The father in *Smith* sued the mother and her family for civil conspiracies to effect an illegal adoption of his child born out of wedlock and to prevent him from exercising his parental rights and for intentional infliction of emotional distress.[176] The court framed the "pivotal question" as "whether [a birth mother] and her parents owe damages [to a birth father] for interfering with his right to attempt to gain custody of the child by exercising her own right to terminate her relationship with the child."[177]

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172. 722 So. 2d 490 (Miss. 1998), *implied overruling on other grounds recognized in* Adams v. Homecrafters, Inc., 744 So. 2d 736 (Miss. 1999). The more stringent test for recovery of damages under a theory of intentional infliction of emotional distress, announced in *Smith*, was expanded in *Adams*, but this has no bearing on the analysis for this Article.

173. 511 S.E.2d 720 (W. Va. 1998).

174. *See* Stone v. Wall, 734 So. 2d 1038, 1047 (Fla. 1999) (holding that a cause of action for intentional interference with the parent-child relationship by a third party non-parent existed in Florida). *But cf.* Lapides v. Trabbic, 758 A.2d 1114, 1121 (Md. Ct. Spec. App. 2000) (finding facts did not warrant recognition of new tort for intentional interference with parental custody).

175. *See Smith*, 722 So. 2d at 492; *Kessel*, 511 S.E.2d at 734-36.

176. *Smith*, 722 So. 2d at 491-92.

177. *Id.* at 498.

In comparison, the father in *Kessel* sued for fraudulent concealment, civil conspiracy for fraudulent concealment of information regarding the location and adoption of the child, and tortious interference with parental relationship.[178] The court held that:

> [T]o make out a prima facie claim for tortious interference with parental relationship, the complaining parent must demonstrate: (1) the complaining parent has a right to establish or maintain a parental or custodial relationship . . .; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the . . . relationship; (3) the outside party's intentional interference caused harm to the . . . relationship; and (4) damages resulted from such interference.[179]

The remarkable commonalities between *Smith* and *Kessel* satisfy the requirements of *Kessel* and the similar holdings answer *Smith's* pivotal question.

Smith was a teenager and Kessel was a medical student completing his residency requirement.[180] Both fathers were unmarried, established their rights to develop a parental relationship with their unborn children by filing paternity actions that they won by default, and obtained temporary restraining orders to halt potential adoptions of their unborn children.[181] Accordingly, the fathers clearly had rights to establish parental relationships, which in turn satisfied the first element required by the *Kessel* court.

In both cases, multiple parties, including the birth mothers, their parents, siblings, and attorneys, concealed information about the mothers' whereabouts despite persistent and substantial efforts of the fathers to locate them.[182] Both mothers used interstate travel to overcome the investigative and legal efforts of the fathers. The combinations of people concealing information constituted conspiracies in each case. The conspiracies operated to interfere with the rights of the fathers to establish a relationship with each child, which satisfied the second element in *Kessel*, that there must be an outside party

178. *Kessel*, 511 S.E.2d at 739.
179. *Id.* at 765-66.
180. *See Smith*, 722 So. 2d at 492; *Kessel*, 511 S.E.2d at 734 n.4.
181. *See Smith*, 722 So. 2d at 492; *Kessel*, 511 S.E.2d at 734-37.
182. *See Smith*, 722 So. 2d at 492-93; *Kessel*, 511 S.E.2d at 734-39.

that interferes in the relationship.

The concealment conspiracies and the interstate travel of the birth mothers, as well as the failure to heed the temporary restraining orders, worked to prevent the fathers from intervening in the adoptions. Ultimately, Smith's daughter and Kessel's son were relinquished by their respective mothers in California and adopted by Canadian couples.[183] The Canadian courts did not permit the fathers to disrupt the adoptions,[184] whereas courts in the United States might have provided impossibility exceptions and interrupted the adoptions. The interference of outside parties prevented fathers from vetoing adoptions which in turn satisfied *Kessel's* third element of harm to the relationship.

Mississippi and West Virginia held that the fathers lost their opportunities to establish relationships with their infants as a result of the information concealed by multiple persons and that the lost parental relationships constituted the fourth element, damages.[185] The holdings answered the pivotal question set out in *Smith* in the affirmative—that the birth mothers' families owed damages to the birth fathers. Smith's pivotal question, however, is wrongly worded. It is not the mothers exercising their rights to terminate their relationships with their children that caused the damages, but rather the mothers' and their families' conspiracies to conceal the States of the birth and the States and countries of the adoptions and their refusal to honor the temporary restraining orders that caused the harm that resulted in the damages.[186]

The only solution to the losses suffered by these fathers lies in the erection of a national putative father registry. Had one existed, the attorneys representing the *Smith* and *Kessel* birth mothers or adoptive parents would have searched the national putative father registry and subsequently served notice upon

183. *See Smith*, 722 So. 2d at 492; *Kessel*, 511 S.E.2d at 736.

184. *See Smith*, 722 So. 2d at 492-93; *Kessel*, 511 S.E.2d at 738.

185. *See Smith*, 722 So. 2d at 498; *Kessel*, 511 S.E.2d at 768.

186. Justice Smith's separate opinion in *Smith* raises three compelling but unavailing arguments: (1) that protecting putative fathers' rights will vitiate birth mothers' reproductive liberty interests; (2) that gender differences justify a rule that gives the mother the exclusive right to consent to adoption; and (3) that the majority's holding therefore encourages mothers to choose abortion, the only reproductive liberty interest of which they have complete control. *Smith*, 722 So.2d at 502-05 (Smith, J., concurring in part and dissenting in part).

the fathers. The fathers could have intervened in the adoptions promptly, and the adoptions either would or would not have happened, but courts would have been able to promptly decide whether the fathers had the rights to intervene and whether intervention was in the best interest of the children. The fathers would not have been forced to sue for tortious interference with parental relationship. In sum, a national registry would better protect children like those in *Smith* and *Kessel.*

IV. TOWARD A NATIONAL PUTATIVE FATHER REGISTRY

The federal government should erect and maintain a putative father database to which each State may contribute data and from which authorized attorneys and agencies in each State may access data. Each State's law should continue to control adoption practice in its State and the use (or non-use) of the national putative father registry databank. Only a federal source can solve the problems present in a society where interstate travel of men and women operates to thwart the rights of fathers in adoptions. Fathers lose control of adoptive situations because they cannot locate their children within the United States; adoptive couples choose international adoptions to avoid the late assertion of birth fathers' rights; and women without means undertake to raise children while remaining unsure of participation by birth fathers. Only a national putative father registry can solve these problems for the nation's children.

The purpose of the registry advances the interests of all three parties. A nationally-linked putative father registry can promote the speedy and secure placement of children with natural parents or with adoptive parents by resolving birth-parent rights issues quickly and finally. Such a system would advance a secure and speedy placement of a child with adoptive parents where a biological father fails to register. This conforms with the notion that quick and efficient placement serves society and the child best.[187]

A national putative father databank advances putative fathers' interests, in that it provides them with a means of

187. For a discussion of three historical models for evaluating biological fathers' rights, see Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions,* 10 TEX. J. WOMEN & L. 69 (2000).

enforcing their rights to their children, particularly newborns. The national registry provides absolute notice of a pending adoption in participating States and this in turn affords much greater protection to the putative father than is currently available. Currently, mothers may not identify the father by name, and States routinely publish service in obscure newspapers—often under the name of John Doe. The national registry, on the other hand, provides meaningful notice to putative fathers at the addresses they provide the registry. Additionally, the registry correctly proclaims to putative fathers that responsibility to assert and protect their rights is theirs and that reliance upon birth mothers is misplaced.

A national putative father registry advances the privacy and safety interests of mothers as well as assisting their adoption decision by clarifying the intentions and rights of birth fathers. The erection of a national registry provides States with the ability to relieve women of naming unwed fathers of their children. This protects the privacy right of a woman not to name the man or men with whom she has had sexual intercourse and relieves the woman of the need to accurately identify the father when she may or may not know his identity. Importantly, protecting mothers' privacy rights also protects their safety from abusive men with whom they have fathered a child, because the registry does not need to disclose the mother's address or location. For example, a woman may conceive her child in Alabama, deliver and relinquish her child for adoption in Kansas, and ultimately decide to settle in Missouri. The registry only needs to provide information about the adoption proceeding in Kansas, so the woman's actual location is concealed. State law would control whether the father's right to consent is affected by his abuse and/or rape. Women could forum shop for the State providing them the most safety.

Additionally, a national registry provides pregnant women with information with which to make their adoption decisions. Women who are not able to raise a child may consider adoption but find their decision impeded by the unknown or at least the unpredictable intentions of the father. A registry notifies a woman of a father's intentions to assert his paternity. State law should require the registering father to file a paternity action. Information concerning fathers' intentions and paternity

actions substantially affect mothers' adoption decisions. With this information, a mother may be able to determine how much paternal financial and custodial assistance she can rely upon.

Lastly, a national putative father registry advances the interests of adoptive parents who want to share their lives with a child but fear disruption of the relationship by the late assertion of a birth father's rights.

A. Federal Participation in National Putative Father Registry

Congress is the appropriate legislative body for putative father registry legislation because adoption has a federal aspect, in that a woman may conceive a child in one State, reside in a second State, give birth in a third State, and relinquish for adoption in a fourth State. It is in this situation, where the biological mother, biological father, the adoptive parent(s), and the child have connections to two or more States, that the individual state putative father registries can neither protect the rights of putative fathers nor advance the interests of children. Only federal legislation providing a national database, linking all participating state registries, can effectively address this family-law problem, even though family law, including adoption, is traditionally reserved to the States. This precise rationale underlies other federal statutes, including most notably the Child Support Recovery Act.[188]

Congress may enact a federal putative father registry database under the commerce power. Adoption is not traditionally considered commerce because nothing is bought or sold. Interstate adoption substantially affects interstate commerce, however, because of the aggregate transaction costs involved. Adoptive parents may incur large legal debts, ranging between zero and $30,000,[189] across at least two States.

188. Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2001). "Every federal circuit that has considered the issues has determined that the CSRA [Child Support Recovery Act] is a valid exercise of congressional power under the Commerce Clause." Laura W. Morgan, *A Federal Hand In Child Support*, 23 FAM. ADVOC. 10, 14 (2001). Morgan goes on to list cases from each circuit which held the CSRA constitutional. *Id.*

189. *See* Nat'l Adoption Info. Clearinghouse, *Costs of Adopting*, *at* http://www.calib.com/naic/pubs/s_cost.htm (last modified Aug. 2, 2000). Domestic private-agency adoption costs range between $4,000 to $30,000; domestic independent adoption costs range between $8,000 and $30,000; and domestic public agency fees range from zero to $2,500. *See id.* These costs may include: court costs, adoptive home investigations (including physical

Part of that debt derives from the interstate nature of the adoption, which necessarily involves interstate travel. These burdens, plus an increased likelihood of litigation resulting from incompatible and unconnected state registries, increase the expense incurred in interstate commerce. A federal registry statute, therefore, will regulate an area "substantially affect[ing] interstate commerce."[190] The commerce power, then, will allow Congress to erect and operate a national putative father registry database.[191]

A secure authority for securing state participation, and providing funding to States, is the spending power. The Supreme Court has adopted the view that Congress has broad authority to tax and spend for the general welfare.[192] A nationally linked putative father database would both advance children's rights to stable and permanent homes and protect the liberty interest unmarried fathers have in developing relationships with their children. These two benefits demonstrate that a national registry database would serve the general welfare of the nation.

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examinations for each prospective parent), post-placement studies, agency fees, attorney fees, birth mother medical and counseling expenses, and birth parent living expenses. *See id; see also* Melinda Lucas, *Adoption: Distinguishing Between Gray Market and Black Market Activities*, 34 FAM. L.Q. 553 (2000). Lucas's cost comparison between independent and public agency adoption is misleading, in that she omits much information on domestic private agency adoptions, i.e., she does not indicate that private agency adoptions (like independent adoptions) reimburse birth mother living expenses. Furthermore, comparing independent and public agency adoption costs is not illustrative because many, if not most, public agencies arrange adoptions of children who have been made wards of the court and placed in foster care; such adoptions are commonly subsidized by the state. Domestic private agency adoptions and domestic independent adoptions are more likely to arrange adoptions of similarly placed infants or children and comparing them yields a truer analysis. Lucas also reports other misinformation, including statements that home studies are not required in domestic independent adoptions. *Id.* at 555.

190. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

191. *See id.* ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., *those* activities that substantially affect interstate commerce.") (citations omitted).

192. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936). Certain limitations, however, attach to Congress's ability to enact a registry under its taxing Power. The Supreme Court has held that Congress may tax and spend for the general welfare under the taxing and spending power so long as it does not violate other constitutional provisions, *see id.* at 66, and so long as Congress's choice is neither clearly wrong nor a display of arbitrary power versus an exercise of judgment, *see* Helvering v. Davis, 301 U.S. 619, 640-41 (1937). The Supreme Court has also required Congress to expressly state the conditions for receipt of federal grants to state governments. *See* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

The Supreme Court has explained that Congress may permissibly set conditions for the receipt of federal funds even as to areas that Congress might otherwise not be able to regulate.[193] Such an arrangement is particularly applicable to a congressional grant of funds to the States for family law purposes, i.e., the erection of state registries compatible with a national database. Specifically, the Court wrote, "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to States shall be disbursed."[194] The Court continued this reasoning in *South Dakota v. Dole*,[195] where Congress sought to create a minimum drinking age by withholding a portion of federal highway funds from States that failed to impose such a minimum drinking age.[196] The Court permitted this conditioning of federal funds, because it served the general welfare by providing for safer interstate travel and it could be characterized as a permissible economic inducement as opposed to coercion.[197] Congress may therefore provide money to States to erect state-level putative father registries and condition this and other federal monies on compliance with national putative father registry guidelines.

In summary, the rationale for such federal intervention into family law, which is traditionally reserved to the States, are the facts that individual States cannot effectively address the problems typically associated with contested interstate adoptions and that only a federally established nationally linked putative father database can solve the problems. A national database may be erected by Congress under the commerce power, and state funding and cooperation may be secured through the spending power.

193. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947).

194. *See id.*

195. 483 U.S. 203 (1987).

196. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 203 (1997).

197. *Dole*, 483 U.S. at 211. *See also* New York v. United States, 505 U.S. 144, 166-67 (1992) (holding that Congress may induce behavior by putting conditions on grants but may not compel state legislative action).

B. Recommendations for Congressional Legislation for a National Putative Father Database

This Article recommends that Congress enact legislation that establishes a national database for putative fathers who have registered in any of the individual States and provide grants to each State tied to the development of a putative father registry compatible with the national database. The federal legislation should also tie the grants to state development of enabling legislation that sets a finite registration deadline, inside of which a father's registration guarantees him notice of a planned or pending adoption. Congress should require such enabling legislation in order to induce a nationwide effort to insure the rights of unwed fathers and secure the stable placement of children for adoption. Because the federal government's contribution would be limited to the erection of a registry database to which States would both contribute information and access information, and because state law would continue to determine adoption procedure, any litigation surrounding the use of the registry would remain in state courts or at least rely upon state law.

The national database should register the following data for any father: name, date of birth, social security number, driver's license number, home address, telephone number, place and address of employment, name and last known address of the mother, location of possible conception, month(s) and/or years of possible conception, birth date of child or expected delivery date, name and gender and birth date of the child if known, and the identification of any court action involving the child.

Congress should limit those who may register a claim to two classes: (1) the States relaying their own state registry information; and (2) the putative fathers themselves or their attorneys. Congress should limit those who may access information to four classes: (1) public agencies and licensed-private agencies accessing information for an adoption; (2) licensed attorneys planning or executing an adoption; (3) mothers who wish to search for their own names; and (4) state vital-statistics agencies maintaining putative father registries. Congress should permit state vital-statistics agencies maintaining registries to search in the event that state law entitles only that agency to make a national database search.

Congress should set fees for registration and for searches of the national database and establish a mechanism for indigent putative fathers to register without cost. The fees should be set at levels that reflect the cost of maintaining the database.

Congress should establish mechanisms to protect the integrity of the database and the privacy of women named by requiring verified and notarized registrations from state agencies and putative fathers or their representatives and verified and notarized search requests from agencies, adoption attorneys, state vital statistics departments, and mothers themselves. Congress should criminalize attempted or actual false filings as well as searches made or attempted to be made in the absence of a planned adoption—with the exception of mothers, who should be able to search their own name at any time.

Congress should establish minimal protocols for the processes of registering and searching that insure the timeliness of both electronic filing of registrations and electronic search responses. Registration in the national registry should occur the same day as the registration is received and the national database should be able to process a proper search and send the results within twenty-four hours.

V. CONCLUSION

A full thirty-three percent of children are born to unmarried mothers. Children born to unmarried mothers are adopted at a higher rate than children born to married women. Contemporary dating relationships, where couples do not maintain an association after sexual intercourse, are commonplace. The high birth rate to unmarried women and the unsteady nature of today's dating relationships create a quandary of how best to protect the rights of unmarried fathers. Protection of these fathers' rights is further confounded by ever amplifying globalization, which increases interstate and intercontinental travel and results in adoptions affecting the rights of residents of multiple States or even multiple countries.[198] The Supreme Court has held that unmarried men have an inchoate right to develop a relationship with their

198. *See, e.g.*, Alexandra Maravel, *Intercountry Adoption and the Flight from Unwed Fathers' Rights: Whose Right is it Anyway?*, 48 S.C. L. REV. 497 (1997).

children and that putative father registries are a constitutional means of protecting those unwed fathers' rights while advancing the prompt and secure placement of children in adoptive homes.

Developing a national database for putative father registries and ultimately making it available to men of other countries who conceive in the United States is the only means of protecting the rights of unmarried men in adoptions where the rights of residents of two or more States are involved.

Chart of State Statutes Describing Paternity Registries

State	Cite	Time	Consequence For Failure to File
1. Alabama	ALA. CODE § 26-10C-1 (2001)	Within 30 days of or before birth (§ 26-10C-1(i))	Irrevocable implied consent to adoption (§ 26-10c-1(i))
2. Arizona	ARIZ. REV. STAT. § 8-106.01 (2001)	Within 30 days of or before birth (§ 8-106.01(B))	No notice; consent to adoption not required (§ 8-106.01(E))
3. Arkansas	ARK. CODE ANN. § 20-18-702 (Michie 2001)	Before birth or adoption Petition (§ 20-18-702(c))	No notice (§ 9-9-224)
4. Colorado	COLO. REV. STAT. § 19-5-105 (2001): by filing with court or registrar of vital statistics or by informally acknowledging or declaring his possible paternity (§ 19-4-105(c)-(e))	Does not state	No notice
5. Connecticut	CONN. GEN. STAT. § 45A-716(B) (2001) putative father who has acknowledged paternity in writing shall be given notice	Does not state	No longer an interested party in adoption § 46b-172a(h)

Paternity Action Requirement	Impossibility Exception	Publication Requirement
No	No	No
Yes, (§ 8-106.01(G))	Yes, if: (1) impossible to register within time specified; and (2) notice of claim of paternity filed within 30 days after possible to file (§ (8-106.01(E))	No
No	No	No
Yes, (§ 19-5-105(5)) failure to file action within 30 days of notice will likely result in termination of parental rights	No	No
Yes, within 60 days after notice must file a claim for paternity (§ 46b-172a(a))	No, but exception if father has shown a reasonable degree of interest, concern, or responsibility for the child's welfare (§ 46b-172a(h))	No

State	Cite	Time	Consequence For Failure to File
6. Florida	FLA. STAT. CH. 88.2011 (2001) Jurisdiction extended to an individual asserting parentage in a tribunal or in a putative father registry maintained in this state		
7. Georgia	GA. CODE ANN. § 19-11-9 (2001)	No later than period beginning two years immediately prior to the child's birth (§ 19-8-12(b)(3))	Still entitled to notice if: identity is known to the petitioner, etc., or if biological father has performed certain acts (§ 19-8-12)
8. Hawaii	HAW. REV. STAT. § 578-2(D)(5) (2000) if file in writing, then treated as presumed father and entitled to notice	May bring action within 30 days of child's birth or before mother gives consent to adoption (§ 584-6(a))	Consent not required (RULE HAW. ST. FAM. CT. 104(D)(5))
9. Idaho	IDAHO CODE § 16-1513 (Michie 1999)	Before birth, placement for adoption in home of prospective parents, or termination of parental rights of birth mother, whichever occurs first (§ 16-1513(2))	Barred from bringing or maintaining any action to establish paternity (§ 16-1513(4))

Paternity Action Requirement	Impossibility Exception	Publication Requirement
Yes, must file within 30 days a petition to legitimate child(§ 19-8-12(f)(1)-(3))	No	Yes, (§ 19-11-9(d)(5))
No	No	No
Yes, (§ 16-1513(4))	No	No

State	Cite	Time	Consequence For Failure to File
10. Illinois	750 ILL. COMP. STAT. 50/12.1 (2001)	Before or within 30 days of birth (750 ILCS 50/12.1(b))	No notice; prima facie evidence of sufficient grounds for termination of parental rights 50/12.1(h)
11. Indiana	IND. CODE. ANN. § 31-19-5-12 (Michie 2001)	1) Before the child's birth; 2) Within 30 days of birth; or 3)Prior to the date of filing a petition for the child's adoption, whichever occurs later (§ 31-19-5-12 (a))	No notice; irrevocable implied consent to adoption (§ 31-19-5-18)
12. Iowa	IOWA CODE § 144.12A (2002)	Before birth, but not later than filing of petition for termination of rights (§ 144.12A (2)(a))	Entitled to notice as "necessary party" under § 600A.6(1) if register; unclear if no filing
13. Louisiana	LA. REV. STAT. ANN. § 9:400 (West 2002)	Before or after birth (§ 9:400(2))	Filing creates a rebuttable presumption of the father. But that filing does not require the consent of the putative father for adoption (§ 400.1)

Paternity Action Requirement	Impossibility Exception	Publication Requirement
Yes, 30 days after receipt of notice must file a declaration of paternity or request to be notified of any further proceedings (50/12a(2))	Yes, if 1) impossible to register within time; 2) failure not his fault; and 3) he registered within 10 days after possible for him to file; lack of knowledge of pregnancy or birth is no excuse (50/12.1(g)(1)-(3))	No
Yes, within 30 days of notice (§ 31-19-9-12 (1)(B))	No	Yes, each 1) clerk of circuit court 2) branch file of motor vehicles, etc., . . . shall post in a conspicuous place a notice that informs the public about the purpose and operation of the registry (§ 31-19-5-14 (a))
No	No	No
No	No	No

State	Cite	Time	Consequence For Failure to File
14. Massachusetts	MASS. GEN. LAWS ch. 210, § 4A (2002)	Before termination of mother's parental rights or before surrender of child for adoption (210 § 4A)	No notice (implicit in 210 § 4A)
15. Michigan	MICH. COMP. LAWS § 710.33 (2001)	Before birth (§ 710.33(1))	Does not address
16. Minnesota	MINN. STAT. § 259.52 (2001)	Before or within 30 days of birth (§ 259.52(7))	1) Cannot assert interest during pending adoption; 2) No notice; 3) Considered to have abandoned child (§259.52(8)). Prima facie evidence of sufficient grounds for termination of parental rights
17. Missouri	MO. REV. STAT. § 192.016 (2001)	Before or within 15 days of birth (§ 453.030(3))	Implied consent to adoption (§ 453.030(3))

Paternity Action Requirement	Impossibility Exception	Publication Requirement
Yes, persons claiming paternity may within 30 days from the date of the mailing of the notice file a petition for adoption or custody (210 § 4A)	No	No
No	No	No
Yes, (§ 259.52(10)) within 30 days of notice must file a completed intent to claim parental rights form stating that he intends to initiate a paternity action within 30 days of notice	Yes, (§ 259.52(8)) if clear and convincing evidence i) impossible to register in time ii) failure was not his fault; iii) registered within 10 days after if became possible to file (§259.52(10))—with regard to paternity action: not bar to receiving notice if good cause shown. Then father must be allowed more time to initiate paternity action	Yes, (§ 259.52(1)(a)) may establish information material and public service announcements as necessary
Yes, (§ 453.030(3)(2)(c))	No	Yes, (§ 192.016(7)(2)-(3))

State	Cite	Time	Consequence For Failure to File
18. Montana	MONT. CODE ANN. § 42-2-202 (2001)	Before birth or within 72 hours of birth; knowledge of pregnancy not required (§ 42-2-206(1)-(2))	No notice (§ 42-2-203(204)(205))
19. Nebraska	NEB. REV. STAT. § 43-104.01 (2001)	Within 5 business days after the birth or within five days of notice contemplated in § 43-104.12 or within 5 days after the last date of any published notice, whichever is later (§ 43-104.02)	No notice; implied consent; termination of parental rights (§ 43-104.04 & § 43-104.05)
20. New Hampshire	N.H. REV STAT. ANN. § 170-B:5-a(I)(c) (2001)	Before birth but must be before mother's rights are voluntarily relinquished, the mother consents to adoption, or the mother's rights are involuntarily terminated (§ 170-B:5-a(I)(c))	No notice; abandonment of child; bars paternity action; (§ 170-B:5-a(I)(c))
21. New Mexico	N.M. STAT. ANN. § 32A-5-20 (Michie 2001)	Within 10 days of birth (§ 32A-5-19(E))	Implied consent; relinquishment not required (§ 32A-5-19)

Paternity Action Requirement	**Impossibility Exception**	**Publication Requirement**
No, but must appear at hearing held on the petition to terminate parental rights (§ 42-2-208)	Yes, with four part test, including concealment of location by the mother and reasonable efforts by the father (§42-2-230(4))	Yes, A notice provided by department that informs the public must be posted in conspicuous places (§ 42-2-214(2)-(3))
Yes, (§ 43-104.05) within 30 days of filing	No	Optional, the department may develop information about the registry and distribute such information through their existing publications, to the news media and the public (§ 43-104.01(5))
Yes, within 30 days of notice must request a hearing at which he will have the burden of proving that he is the father of the child (§ 170-B:5-(a)(II))	No	No
No	No	No

State	Cite	Time	Consequence For Failure to File
22. New York	N.Y. SOC. SERV. § 372-C (2000)	Does not specifically state	No notice (N.Y. DOM. REL. 111-A(2)(B))
23. Ohio	OHIO REV. CODE ANN. § 3107.062 (Anderson 2001)	Within 30 days after birth (§ 3107.07(B)(1)	Implied consent (§ 3107.07(B)(1))
24. Oklahoma	OKLA. STAT. tit. 10, § 7506-1.1 (2000)	No specific time given	No notice
25. Oregon	OR. REV. STAT. § 109.096 (1999)	Must be on file at the time of placement of child in physical custody for purpose of adoption (§ 109.096(3))	Barred from contesting adoption (§ 109.096(3) & § 109.098(2)-(3))
26. Pennsylvania	23 PA. CONS. STAT. § 5103(B) (2001)—putative father entitled to notice of any proceeding brought to terminate any parental rights		
27. Tennessee	TENN. CODE ANN. § 36-2-318 (2001)	Before or within 30 days after birth (§ 36-2-318(e)(3))	Normal requirements to terminate parental rights must be met (see § 36-1-117), even if not registered (§ 36-2-318(d)(2))

Paternity Action Requirement	Impossibility Exception	Publication Requirement
No	No	No
No	No	Yes, (§ 3107.065(B))
No (§ 7503-3.1(B)(2)(a))	Yes, if by clear and convincing evidence can show failure to appear due to unavoidable circumstances; must file application within 10 days of failure to appear (§ 7505-2.1(G))	Yes, (§ 7506-1.1(J)(2))
No	Yes, if within 1 year after entry of final decree or order proves in court fraud by petitioner (§ 109.096(8))	No
Yes, within 30 days of notice must file suit or intervene in adoption, otherwise sufficient cause to terminate parental rights (§ 36-2-318(j))	No	No

State	Cite	Time	Consequence For Failure to File
28. Texas	TEX. FAM. CODE § 160.256 (2002)	Before birth or within 30 days of birth (§ 160.256(c))	Cannot assert interest in child other than by filing paternity suit before termination of his parental rights (§ 160.258)
29. Utah	UTAH CODE ANN. § 78-30-4.14 (2001)	Before mother consents to adoption or relinquishes child to placement agency (§ 78-30-4.14(1)(e))	Waiver and surrender of any right in relation to the child (§ 78-30-4.14(5)
30. Vermont	VT. STAT. ANN. tit. 15A, § 1-110 (2001)	Any time (§ 1-110(a))	None
31. Wisconsin	WIS. STAT. § 48.025 (2001)	Anytime before termination of the father's rights (§ 48.025(2))	If paternity has not been acknowledged court may or may not order notice by publication (§ 48.42(4)(b)(2)-(4))
32. Wyoming	WYO. STAT. ANN. § 1- 22-117 (Michie 2001)	Before or after birth of child out of wedlock (§ 1-22-117(a)(ii) or if father has acknowledged paternity prior to an interlocutory hearing (§ 1-22-108(d))	If father unknown, court may be approve adoption without his consent (§ 1-22-110(a))

Paternity Action Requirement	Impossibility Exception	Publication Requirement
	Yes, if father's identity and location are known, even if failed to register (§ 161.002(b)(2))	No
Yes, if child is under the age of 6 months (§ 78-30-4.14(2)(b)(i))	No	No
No	N/A	No
No	No	No
Yes, within 30 days of notice must advise of his interest in or responsibility for the child or his declaration of paternity (§ 1-22-110(a)(vi))	No, unless he is identified by the mother or agency or has lived with or married the mother after the birth of the child before adoption petition and if before interlocutory hearing of he has acknowledged the child as his own (§ 1-22-108(d))	No